understand this bill, to say, no, this really does support the small investor, and the President decided to go with that rhetoric rather than with what I consider to be the true substantive benefit of this bill.

So we are back again. We have gone through this argument in committee. The bill was reported out of committee by a strong bipartisan margin. We are back into it here on the floor. As indicated, the bill was passed by the Senate by a strong bipartisan margin. It has gone through the House. The override vote was 319 to 100, more than 3 to 1. It needed only be 2 to 1, but it was more than 3 to 1. So that makes it very clear there is a strong bipartisan message here.

I am interested that the authorship of this bill began on the Democratic side of the aisle with Senator DODD, joined on the Republican side of the aisle by Senator DOMENICI. It was known as the Dodd-Domenici bill in the previous Congress. Now, given the results of the election, it is called the Domenici-Dodd bill. But it demonstrates the bipartisan nature, rising above partisan bickering, that has marked this entire effort. The effort has taken years, and in the years since Senator DODD began his crusade to get this problem fixed, there have been millions, if not hundreds of millions of dollars wasted, investor dollars wasted in dealing with these frivolous lawsuits. If this veto is upheld, there will be millions, if not hundreds of millions of dollars wasted in the future.

This legislation will ultimately pass. It will ultimately pass because it is the right thing to do and more and more people recognize that it is the right thing to do. The only question is whether it should pass in this Congress and become law in this year. I believe the time has gone long enough for us to debate this and repeat the arguments back and forth. The time has come for us to pass this bill.

So I hope the Senate will respond, as the House has done, with a strong bipartisan majority to override the President's veto. I expressed my concern that I think the President was misguided by his advisers on this one, both those who advised him on the substance and those who may have advised him on the politics. I hope we will help correct this Presidential mistake by what we do here on the floor.

Mr. President, I could go on and repeat all of the arguments that have been made in committee and on the floor on this issue, but I see the senior Senator from Maryland, who was the ranking member of the Banking Committee and who is opposed to this bill, and undoubtedly in support of the President's veto. He is on the floor, and I will be happy to yield to him for whatever opening statement he might have. Then we can go forward from there.

Mr. President, I yield the floor.

The PRESIDING OFFICER. The Senator from Maryland.

Mr. SARBANES. Mr. President, as I understand it, the distinguished Senator from Tennessee would like to address the Senate for a short period of time. I ask unanimous consent the Senator from Tennessee be recognized, and at the conclusion of his remarks I then be recognized.

The PRESIDING OFFICER. Without objection, it is so ordered.

The Senator from Tennessee.

THE HOWARD H. BAKER, JR. COURTHOUSE

Mr. THOMPSON. I thank the Senator from Maryland, and I thank the Chair.

Mr. President, one of the highest honors that I have in serving in the U.S. Senate is the fact that I hold a seat once occupied by Howard H. Baker, Jr. I have no doubt that this seat will always be known as the Baker seat, and that is how it should be.

This morning I rise and it is my honor to rise in support of the action of the Senate taken last night, just prior to adjournment. The Senate passed H.R. 2547 to name the new U.S. courthouse in Knoxville, TN, in the Senator's beloved east Tennessee, after Senator Baker.

I know that the Howard H. Baker, Jr. Courthouse will always serve as a reminder of the love and respect that all Tennesseans, as well as all Members of this body, have for him.

Mr. SARBANES. Mr. President, let me simply say I am delighted to hear the courthouse has been named for our very able colleague, Howard Baker. I did wonder whether Howard Baker would be able to practice law in the Howard Baker Courthouse, but I guess that issue can be settled when the time arises. But it is certainly a recognition that his very distinguished career here in the Senate makes well deserved.

SECURITIES LITIGATION REFORM ACT—VETO

The Senate continued with the reconsideration of the bill.

Mr. SARBANES. Mr. President, first I want to say that the logic of my colleague from Utah is absolutely right. I think he said right at the end of his remarks that I was against the bill and, therefore, he assumed that I would be in support of the veto. And he is obviously correct. I will not now—I may later—talk a bit about the broader defects which I see in the legislation. But I want to address now the items that were touched upon in the President's veto message as the basis for his vetoing the legislation.

My own view is that there are other reasons as well that go well beyond what the President indicated. But I want to focus on that for the moment since it is the veto message, the veto, that is before us. And the issue, of course, would be whether to override the veto.

I listened to my distinguished colleague from Utah as he talked, and to the various examples that he gave as a reason for why we should pass this legislation in terms of the kinds of suits that had been brought and the frivolousness of the actions. And I want to simply say to him that, if that is all the bill did, if the bill were crafted in a way to get at the kind of examples he was citing, I think the bill would have passed 99–0. So I do not really differ with him in the examples that he cited as being problems and saying that those are problems and measures ought to be taken in order to correct them. The problem is that this bill goes way beyond that. That is the problem.

The President, since the conference report was passed 2 weeks ago, has now vetoed it. That actually reflects, I think, the overwhelming position taken by newspaper and magazine editors around the country who have analyzed this legislation and who have no vested interest in it. There are a number of interest groups who have an interest on either side of this legislation. But these are common indicators outside of that framework. They have by and large strongly come down against it.

The President said in his message, ''Those who are victims of fraud should have recourse in our courts. Unfortunately, changes made in this bill during conference could well prevent that.''

I hope that the Senate will sustain the President's veto so that we could get about the business of crafting legislation better targeted at the goal that I think we all share—deterring frivolous lawsuits. I want to emphasize that again. I know of no one who argues against reasoned measures to deter frivolous lawsuits.

The President's veto message recognizes that this bill is not a balanced response to the problem of frivolous lawsuits. This legislation will affect far more than frivolous lawsuits. As I said at the outset, if the bill dealt only with the problem of frivolous lawsuits, I would be for it, and presumably the President would have signed it.

Unfortunately, this bill that is before us will make it more difficult for investors to bring and recover damages in legitimate fraud actions. Investors will find it far more difficult to bring and to recover damages in legitimate fraud actions.

The editors of Money magazine concluded that this legislation hurts investors, stating in their December editorial as follows: ''Now only Clinton can stop Congress from hurting small investors like you.'' That is Money magazine. The President has tried to do that through the veto. We should do our part now by supporting this veto.

The President's message identified three areas of concern with the bill: The pleading standard, the safe harbor, and the rule 11 provision. On the first point, the President said, and I quote him: ''The pleading requirements of the conference report with regard to a defendant's state of mind impose an unacceptable procedural hurdle to meritorious claims being heard in Federal courts.''—''an unacceptable procedural hurdle to meritorious claims being heard in Federal court.''

What are pleading standards? Some of this, of course, gets very lawyerly, but it has to get lawyerly because you are really talking about the basis on which people have access to the courts. That may appear to be a highly technical legal matter, and in some respects it is. But the practical result is very real for people who may have been defrauded or abused in terms of making their investment decisions.

Pleading standards refer to what an investor must show in order to initiate a securities fraud lawsuit. In other words, what must you establish in order to get the lawsuit started? The bill that was reported by the Senate Banking Committee adopted the pleading standard used by the U.S. Court of Appeals for the Second Circuit. That standard says that investors seeking to file securities fraud cases must, and I quote: ''specifically allege facts giving rise to a strong inference that the defendant acted with the required state of mind.''

In other words, the plaintiff in setting out his pleading has to specifically allege facts that give rise to a strong inference that the defendant acted with the required state of mind. This is a standard more stringent than the Federal Rules of Civil Procedure. It, in fact, is a minority view amongst the circuit courts in terms of the threshold that the plaintiff has to cross in order to initiate a securities fraud lawsuit.

But that was a standard adopted in the committee, in the committee-reported bill. When the bill came to the Senate floor, the Senate adopted an amendment to this provision that was offered by the distinguished Senator from Pennsylvania, Senator SPECTER. Senator SPECTER's amendment codified, brought into the statute, additional second circuit holdings clarifying this standard. These additional second circuit holdings state that a plaintiff may meet the pleading standard by alleging facts showing the defendant had motive and opportunity to commit fraud or constituting strong circumstantial evidence of state of mind. What the second circuit has done is they have enunciated this holding with respect to pleadings, and then in subsequent opinions they had clarified this standard to make it clear that motive and opportunity to commit fraud, or facts constituting strong circumstantial evidence of a state of mind, would also meet the pleading standard.

The argument made was that, if you are going to take the second circuit standard, then you ought to take the second circuit's elaboration of its standard, which seems to me an eminently logical and reasonable position.

I think it is probably safe to say that the only pro-investor amendment adopted on the Senate floor was the Specter amendment.

I thought it was a constructive contribution to the legislation, and a majority of this body, I think on a vote of 57 to 42, agreed with that.

Unfortunately, this amendment was dropped in conference, the SPECTER amendment. The conference report deleted the SPECTER amendment, leaving investors without the protection of the additional second circuit holdings. And the President in his veto message said the following:

> The conferees deleted an amendment offered by Senator SPECTER and adopted by the Senate that specifically incorporated Second Circuit case law with respect to pleading a claim of fraud. Then they specifically indicated that they were not adopting Second Circuit case law but instead intended to strengthen the existing pleading requirements of the Second Circuit. All this shows that the conferees meant to erect a higher barrier to bringing suit than any now existing—one so high that even the most aggrieved investors with the most painful losses may get tossed out of court before they have a chance to prove their case.

Mr. President, I think that President Clinton was well advised to object to that provision of the conference report. A number of eminent law professors, experts without any axe to grind, wrote to the President warning of the consequences of that provision.

Professor Arthur Miller of the Harvard Law School, a nationally recognized expert on civil procedure, warned that the pleading standard adopted in conference, and I quote him, ''effectively will destroy the private enforcement capacities that have been given to investors to police our Nation's marketplace.''

John Sexton, the very able and distinguished dean of the New York University School of Law, one of our Nation's preeminent law schools, and also an expert on civil procedure, wrote, ''It simply will be impossible for the plaintiff, without discovery, to meet the standard inserted by the conference committee at the last minute.'' Let me repeat that from Dean Sexton. ''It simply will be impossible for the plaintiff, without discovery, to meet the standard inserted by the conference committee at the last minute.''

Joel Seligman, dean of the University of Arizona School of Law and an expert in securities law, also expressed concern that the pleading standard would ''prevent a significant number of meritorious lawsuits from going forward.''

These are all very distinguished legal experts, very knowledgeable on this particular area of the law, and all expressing these very strong judgments about the impact of what was done in the conference with respect to this issue.

I ask unanimous consent that those letters be printed in the RECORD at the end of my remarks.

The PRESIDING OFFICER (Mr. COVERDELL). Without objection, it is so ordered.

(See exhibit 1.)

Mr. SARBANES. Mr. President, sustaining the President's veto would give the Congress a chance to craft a more reasonable pleading standard. This is a very important issue. It may not appear to be so, but the end result of not having a reasonable pleading standard is that you will prevent people with meritorious claims from being able to initiate and carry through their suit. I wish to underscore, I am talking about people with meritorious claims.

A reasonable pleading standard, as was in the original proposed bill and enhanced by the SPECTER amendment, would not provide any opening for frivolous lawsuits but it would ensure that meritorious lawsuits were not barred from the courtroom.

Let me turn to safe harbor, which, of course, was an issue on which there was extended discussion in this Chamber in the course of the consideration of this legislation and then again on the conference report. The President stated with respect to the safe harbor provision—this is the President in the veto message:

> While I support the language of the conference report providing a ''safe harbor'' for companies that include meaningful cautionary statements in their projections of earnings, the Statement of Managers—which will be used by courts as a guide to the intent of the Congress with regard to the meaning of the bill—attempts to weaken the cautionary language that the bill itself requires. Once again, the end result may be that investors find their legitimate claims unfairly dismissed.

The safe harbor provision creates a statutory exemption from liability for so-called forward-looking statements. Forward-looking statements are broadly defined in the bill to include both oral and written statements—both oral and written statements. Examples include projections of financial items such as revenues and income for the quarter or for the year, estimates of dividends to be paid to shareholders, and statements of future economic performance such as sales trends and developments of new products. In short, forward-looking statements include the type of information that is important to investors deciding whether to purchase a particular stock.

I differ somewhat with the President on his analysis because I think the safe harbor language in the bill as well as the language in the statement of managers is troublesome. It is my very deep concern that the safe harbor provision in this legislation will, for the first time, protect fraudulent statements under the Federal securities law. The American Bar Association wrote the President that the safe harbor ''has been transformed not simply into a shelter for the reckless but for the intentional wrongdoer as well.''

Think of that, not simply into a shelter for the reckless but for the intentional wrongdoer as well.

Projections by corporate insiders will be protected, even though they may be unreasonable, misleading, and fraudulent, if accompanied by boilerplate cautionary language.

The claim is made that the bill codifies a legal doctrine applied by the courts known as ''bespeaks caution.'' As I understand it, all courts that have applied this doctrine have required that projections be accompanied by disclaimers specifically tailored to the projections. If companies want to immunize their projections, they must alert investors to the specific risks affecting those projections.

In other words, general boilerplate language will not do that. The bill before us today does not include—does not include—this requirement of specific cautionary language to investors.

The Association of the Bar of the city of New York warned of this provision stating:

> . . . the proposed statutory language, while superficially appearing to track the concepts and standards of the leading cases in this field, in fact radically departs from them and could immunize artfully packaged and intentional misstatements and omissions of known facts.

Let me just repeat that because the Association of the Bar of the city of New York is a very distinguished organization and they do in-depth studies of important legal issues. Their studies are widely respected and widely referred to in the legal profession.

What they warned about in this safe harbor provision was that:

> . . . the proposed statutory language, while superficially appearing to track the concepts and standards of the leading cases in this field, in fact radically departs from them and could immunize artfully packaged and intentional misstatements and omissions of known facts.

This letter was signed for the bar association by Stephen Friedman, a former SEC Commissioner.

Prof. John Coffee, a distinguished professor at the Columbia Law School, wrote to the President:

> . . . rather than simply codify the emerging 'bespeaks caution' doctrine, it is much closer to the truth to say that the Act overrules that doctrine.

Mr. President, I ask unanimous consent that the Coffee letter discussing this issue and another by him be printed in the RECORD at the conclusion of my remarks.

The PRESIDING OFFICER. Without objection, it is so ordered.

(See exhibit 2.)

Mr. SARBANES. While I believe the safe harbor language in this bill is a problem, the President in his veto message has raised an additional valid point with respect to the safe harbor language in the statement of managers.

The President points out that the language in the statement of managers attempts to weaken the cautionary language that the bill itself requires. The President received advice on this point from Professor Coffee, who wrote:

> . . . under the proposed legislative history there now appears to be no obligation to disclose the most important reasons why the forward-looking statement may prove false.

And Professor Coffee went on to state:

> . . . no public policy justification can support such selective disclosure of the less important facts while withholding the most important.

So I have difficulty with the provision in the legislation itself, as I have indicated, but on top of that you have this Statement of Managers seeking to create legislative interpretation which, as the President pointed out, attempts to weaken the cautionary language that the bill itself requires.

So that a weak provision has been rendered, well, Professor Coffee, I guess, would say, nonexistent. He stated earlier:

> . . . rather than simply codify the emerging ''bespeaks caution'' doctrine, it is much closer to the truth to say that the Act overrules that doctrine.

Sustaining the veto would give the Congress the chance to craft a more reasonable legislative approach on the safe harbor issue.

Let me turn to the rule 11 provision. The President's veto message on this matter states:

> . . . The Conference Report's Rule 11 provision lacks balance, treating plaintiffs more harshly than defendants in a manner that comes too close to the ''loser pays'' standard I oppose.

We had a discussion about this when we dealt with the conference report, I say to my colleagues. When we sent the bill to conference, the way we drafted the bill in the Senate, under Rule 11, we treated plaintiffs and defendants evenhandedly with respect to either bringing of frivolous suits or asserting a frivolous defense.

It is clear to me that that is the way it ought to be done. Rule 11 of the Federal Rules of Civil Procedure is the principal sanction against the filing of frivolous lawsuits in the Federal courts. It requires all cases filed in the Federal courts to be based on reasonable legal arguments and supported by the facts. As passed by the Senate, the bill required that courts include specific findings in securities class actions regarding compliance by all parties and attorneys with rule 11(b) of the Federal Rules of Civil Procedure.

This is as passed by the Senate. If a court found a violation of rule 11 by the plaintiff or the defendant, the court was required to impose sanctions. The provision was balanced. The sanctions would have applied equally to plaintiffs and defendants. This was intended as a deterrent to frivolous cases. I believe it would have worked well. In conference, this balance was removed so the legislation now applies more harshly to investors than to corporate insiders.

The Senate bill as we passed it contained a presumption that the appropriate sanction for failure of the complaint or the responsive pleading or motion to comply with rule 11 was an award of reasonable attorneys fees and other expenses incurred as a direct result of the violation.

The conference changed this presumption so it no longer applies equally to plaintiffs and defendants. I defy any of my colleagues to justify this either in logic or reason. This was a change made by the conference so that it no longer applies equally to plaintiffs and defendants. If the defendant substantially violates rule 11, he pays only reasonable attorneys fees and other expenses incurred as a direct result of the violation; this is the standard that was in the Senate-passed bill. If the plaintiff is found to have substantially violated rule 11, he pays all attorneys fees incurred in the action, not just those resulting from the violation.

This is a major and significant disparity. There is no justification for such disparate treatment. Of course, its result will be to scare investors from bringing meritorious fraud suits. The legal experts agree that that will be the result of this provision.

Professor Miller, of Harvard Law School, wrote of this provision—and I quote him—and listen carefully to this quote:

> . . . It is inconceivable that any citizen, even one with considerable wealth and a strong case on the merits, could undertake securities fraud litigation in the face of the risks created by these provisions.

Dean Sexton, of New York University Law School, wrote:

> . . . the obvious effect of these provisions: who but a fool would risk the remainder of his or her life savings, having already been defrauded out of much of them? Even wealthy interest will not expose their assets to the possible onslaught of unlimited defense costs, or judicial fee-shifting excesses.

Sustaining the President's veto would give Congress the chance to craft a more reasonable rule 11 provision, actually to go back to the provision that the Senate passed before it was mutilated in the conference committee.

Sustaining the President's veto, of course, obviously would not be the end of this legislative effort. There is, obviously, very strong support in the Congress for dealing with the issue of frivolous lawsuits. The difference is not to go so far that you have an unbalanced product. The debate tends to be a citation of abusive instances, and I want to make it very clear that those of us who support the veto do not defend the abusive instances and would support legislation designed to deal with it.

But this legislation goes too far, as I have indicated, in the three provisions the President focused on in his veto message: the pleading standard, the safe harbor and the now unbalanced rule 11 provision. In each instance, that would make it more difficult for innocent investors to bring lawsuits and to recover damages when they have been defrauded.

This is a piece of legislation people are going to have to live with on their history, and I am prepared to predict here today that the consequence of this legislation will be that innocent people with meritorious claims will not be able to assert them in court; the people who have been defrauded will not be able to obtain a remedy; the Charles Keatings of the world will walk free; and senior citizens, pension plans, ordinary investors will have no recourse. The stories then that are going to be told are going to be the stories of predatory actions against innocent people, with them not having any way to obtain justice.

The President said in the veto message:

> It is not appropriate to erect procedural barriers that will keep wrongly injured persons from having their day in court.

The Congress ought to take the opportunity to rework this legislation to eliminate these defects, to get a piece of legislation that we could all agree on as being worthwhile and meritorious, that was not subjected to the sort of scathing criticism that is reflected in these letters from some very distinguished legal scholars with respect to this matter.

These people do not argue against doing something about frivolous lawsuits, but they are saying in the course of trying to do that, do not go so far that you are ruling out meritorious lawsuits. There is plenty of time remaining in this Congress. It is not as though we are at the end of a Congress, so that if you do not act, you have to start all over again. There is plenty of time remaining in this Congress to deal with this matter.

Other provisions in this legislation, which no one has raised an issue about, provide protection against the professional plaintiff, against class action lawyers who abuse investors who have been defrauded. Those provisions no one is questioning.

Most of the debate focuses on extreme cases. The provisions in the legislation that address the extreme cases no one is arguing against. So I want it clearly understood, when we hear these various horror stories, the provisions that would get at those instances, no one is questioning. We are prepared to see those go into law.

But I think we have to really narrow the focus down to what is at issue here.

There is a great tendency to cite the extreme examples, but no one is contesting the extreme examples. We need to craft a piece of legislation, of which we can be proud, that stands legal scrutiny and that will not result in individual investors, pension funds, local governments suffering when they are defrauded in the securities markets and are denied their day in court.

Sustaining the veto would enable us to do that, and I think the end result would be that we would have a better piece of legislation, and the end result then would be that we would not come back on another day citing the horror stories of investors who have been defrauded who, by any standard, ought to be able to obtain justice and are denied their day in court.

Mr. President, I yield the floor.

EXHIBIT 1

HARVARD LAW SCHOOL,
Cambridge, MA, December 19, 1995.

Hon. WILLIAM J. CLINTON,
President of the United States,
The White House,
Washington, DC.

DEAR MR. PRESIDENT: On December 12 I wrote to you concerning the so called ''securities reform'' legislation, then embodied in Senate Bill 240. I urged you to oppose that legislation because (1) it was based on a totally erroneous assumption that there had been a sharp increase in securities litigation in the recent past, which is completely belied by every statistical measure available; (2) the federal courts, exploiting a variety of procedural tools such as pretrial management, summary judgment motions, sanctions, and enhanced pleading requirements, were achieving many of the goals of the so called reformists, most particularly the deterrence of ''frivolous'' litigation; (3) recent history suggests that the same vigilance is needed today to guard against market fraud as was needed during the superheated activity in the securities business in the mid-1980's; and (4) the SEC simply is unable to perform the necessary prophylaxis to safeguard the nation's investors, and private enforcement is an absolutely integral part of policing the nation's marketplaces.

I am writing again because the latest version of the legislation, H.R. 1058, contains provisions regarding pleading in securities cases and sanction procedures that, if anything, make the legislation even more draconian and access-barring than Senate Bill 240. It simply is perverse to consider it a ''reform'' measure.

I have always taken great pride in the fact that the words ''equal justice under law'' are engraved on the portico of the United States Supreme Court. I fear, however, that if the proposed legislation is signed into law, access to the federal courts for those who have been victimized by illicit practices in our securities markets will be foreclosed, effectively discriminating against millions of Americans who entrust their earnings to the securities markets. As difficult as the existing Federals Rules of Civil Procedure already make it to plead a claim for securities fraud sufficient to survive a motion to dismiss, especially given existing judicial attitudes toward these cases, the passage in House Bill 1058 requiring that the plaintiff ''state with particularity facts giving rise to a strong inference'' that the defendant acted with scienter, in conjunction with the automatic stay of discovery pending adjudication of dismissal motions, effectively will destroy the private enforcement capacities that have been given to investors to police our nation's marketplace. Despite misleading statements in the Statement of Managers that this provision is designed to make the legislation consistent with existing Federal Rule 9, the truth is diametrically the opposite, since the existing Rule clearly provides that matters relating to state of mind need not be pleaded with particularly. Indeed, it would be more accurate to describe the proposal as a reversion to Nineteenth Century notions of procedure. The proposed legislation also does considerable damage to notions of privilege and confidence by demanding that allegations on information and belief must be accompanied by a particularization of ''all facts on which that belief is formed.''

The situation is compounded by the proposed fee shifting and bond provisions that relate to the enhanced sanction language in the legislation. It is inconceivable that any citizen, even one with considerable wealth and a strong case on the merits, could undertake securities fraud litigation in the face of the risks created by these provisions. As the person who was the Reporter to the Federal Rules Advisory Committee during the formulation and promulgation of the 1983 revision of Federal Rule 11, the primary sanction provision in those Rules, I can assure you that no one on that distinguished committee would have possibly supported what is now so cavalierly inserted into the legislation.

I use the word ''cavalierly'' intentionally, because, as I indicated to you in my earlier letter, there is not one whit of empiric research that justifies any of the procedural aspects of this so called ''reform'' legislation. Not only does every piece of statistical evidence available belie the notion that there is any upsurge in securities fraud cases, but these proposals, with their devastating impact on our nation's investors, have completely bypassed the carefully crafted structure established in the 1930's for procedural revision that has enabled the Federal Rules to maintain their stature as the model for procedural fairness and currency. Thus, the proposed legislation represents a mortal blow both to the policies that support the private enforcement of major federal regulatory legislation and to the orderly consideration and evaluation of all proposals for the modification of the Federal Rules. From my perspective, which is that of a practitioner in the federal courts, a teacher of civil procedure for almost thirty-five years, and a co-author of the standard work on federal practice and procedure, I fear that all of this is extremely regrettable.

I hope you will give serious consideration to vetoing the legislation. If I can be of any further assistance to you or your staff in considering these and related matters, please do not hesitate to inquire. My telephone number is 617/495–4111.

My very best to you and your family during this wonderful holiday season.

Sincerely yours,

ARTHUR R. MILLER,
Bruce Bromley Professor of Law.

THE UNIVERSITY OF ARIZONA,
Tucson, AZ, December 13, 1995.

Hon. WILLIAM J. CLINTON,
The President,
The White House,
Washington, DC.

DEAR MR. PRESIDENT: I am writing to urge you to veto pending legislation, The Private Securities Litigation Reform Act H.R. 1058.

For the past 18 years, my principal work has been in the field of federal Securities Regulation. I am the co-author with Harvard Law School Professor Louis Loss of an 11 volume treatise on Securities Regulation, published by Little, Brown & Co., which is generally considered to be the leading treatise in the field. I have written four other securities regulation related books and over 25 Law Review articles in this area. Earlier I had a discussion with respect to a different version of H.R. 1050 with your General Counsel, Abner Mikva.

The current bill, while an improvement over legislation that was introduced last January, is unduly heavy handed and clumsily drafted and would prevent a significant number of meritorious law suits from going forward. I am particularly concerned no only about the safe harbor provisions, but also about provisions concerning Rule 11, the pleading requirements; and the extraordinarily one-side language that appears in the legislative history. Legislative history may not be a point many people have emphasized, but it is my understanding that it was written without earlier review by the Securities and Exchange Commission or its staff, and reflects policy preferences more typical of what appeared in the January 1995 version of this legislation. I take legislative history very seriously, for having studied every reported federal securities Law decision over the past 12 or so years as a result of my work with Professor Loss, I am well aware that it is frequently dispositive in questions such as those addressed in this particular legislation.

If this bill is vetoed, I am confident it will not be the end of the road for this process. It is possible for Congress if the veto is sustained to draft a more balanced and appropriate bill within a matter of weeks. On the other hand, if this bill is not vetoed, this will provide opportunity for that small number of corporations that do engage in federal securities fraud to feel a greater sense of immunity from private litigation, and in many instances, given the limitations of the SEC and Justice Departments budgets, from any litigation deterrent at all.

Sincerely,

JOEL SELIGMAN,
Dean and Samuel M. Fegtly Professor of Law.

NEW YORK UNIVERSITY
SCHOOL OF LAW,
New York, NY, December 13, 1995.

President WILLIAM J. CLINTON,
The White House,
Washington, DC.

DEAR MR. PRESIDENT: I am a student and teacher of Civil Procedure and the principal active author of the most widely used textbook on the subject. I approach matters of Civil Procedure not as an advocate for particular parties, but as a scholar interested in coherence, fairness and efficiency in the system. I am imposing upon your time with this letter because I feel compelled to convey my view that the Conference Committee Securities Litigation Reform bill (which in critical respects is dramatically different from the Senate bill) is a procedural nightmare that will chill meritorious litigation by victims of securities fraud—and equally importantly, will provide a precedent for substantive procedural rules which most certainly will be copied with disastrous consequences in other areas (for example, in the area of civil rights).

The Conference Committee bill effects far-reaching procedural changes that will govern both class and individual litigation in one type of federal case—litigation under the federal securities laws. These will affect not only shareholder claims, but also insurance policyholders and limited partnership claims, among others, which seek relief under federal securities laws. The bill advances these procedural changes, which undermine fifty years of procedural reform, without consulting even a single judicial witness in its hearings. Cumulatively, the reforms will impose obstacles that will make it impossible for the average citizen to pursue, let alone to prevail upon, virtually any securities claims, no matter how valid.

I will not examine every section of the bill; rather, I will confine my comments to the provisions which, viewed from the perspective of a proceduralist, seem most perverse.

HEIGHTENED PLEADING REQUIREMENTS

Although the Senate bill purported to adopt the Second Circuit's already elevated (beyond Rule 9) pleading requirements for fraud, the Conference Report goes beyond that, requiring that the complaint shall "state with particularity facts giving rise to a strong inference" that the defendant acted with scienter (emphasis supplied). In addition, the Conference Report contains an automatic stay of discovery pending adjudication of a motion to dismiss.

In essence, the Conference Report establishes almost insurmountable hurdles in the form of pleading requirements as a barrier to federal court. Absent the most extraordinary circumstances (such as a prior federal indictment), it simply will be impossible for the plaintiff, without discovery, to meet the standard inserted by the Conference Committee at the last minute, which is to state "with particularity" facts that give rise to a strong inference that a defendant acted with the required state of mind at the outset of the case. While the Statement of Managers recites that the words "with particularity" were added to make this requirement consistent with Federal Rule of Civil Procedure 9, that Rule explicitly states that facts on state of mind need not be specifically set forth. No other type of case requires such precise pleading—because it was long ago recognized as impossible to achieve except for those intimately involved in an action, a status not enjoyed by people buying stock on the open market.

In addition, the pleading requirement states that "if an allegation regarding a fraudulent statement or omission is made on information and belief, the complaint shall state with particularity all facts on which that belief is formed." That requirement would appear to provide that the plaintiff would have to set forth all confidential sources in the complaint, including the names of whistleblowers and members of the media. This disclosure requirement deters pre-complaint investigation and completely reverses the attorney-work product protection afforded other types of litigants.

ENHANCED SANCTIONS AND BOND REQUIREMENT

I am opposed to fee-shifting, and I always have understood that was your policy as well. Any significant chance of fee-shifting will deter all meritorious cases in which a plaintiff has little to gain in potential recovery in relation to the magnitude of the fees to be shifted, as is frequently the case in securities class action litigation. In these circumstances, any significant chance of fee-shifting is going to be a major deterrent. The simple mathematics of the situation suggests the obvious effect of these provisions: who but a fool would risk the remainder of his or her life savings, having already been defrauded out of much of them? Even wealthy interests will not expose their assets to the possible onslaught of unlimited defense costs, or judicial fee-shifting excesses.

Similarly the bond provision, which has no standard to guide its administration, is completely inequitable and will operate only against plaintiffs. The notion that such a bond provision could run against defendants is preposterous, as it is clearly unconstitutional to require an individual to post a bond in order to defend himself or herself in court.

PERVERSE CUMULATIVE SYNERGY OF PROCEDURAL CHANGES

The disastrous effects of all these changes on meritorious litigation can be seen easily if one hypothetically shifts the context to Title VII litigation—the likely next target for the "reformers" if this bill becomes law. Given the extraordinarily high economic exposure (resulting from the possibility of sanctions), the necessity of a bond, and the difficulty in meeting the pleading requirement without discovery, is it possible to imagine many plaintiffs (even those with what appear to be winning cases) taking the risk even of initiating litigation? And, of course, this will be the case in securities litigation as well. Essentially, through "procedural reform" and a selective return to Nineteenth Century pleading rules, real victims will be prevented from seeking redress.

Because much litigation will never come to be, it would be wrong to assert that the courts will be able to ameliorate these rules. Moreover, in the case of the highly problematic pleading requirements, even in those suits which materialize the courts would not have the power to overrule a directive from a statute. Thus, though the Second Circuit could promulgate its interpretation of the pleading requirement of Rule 9 on matters other than intent, it could not have applied its test in the area of intent, because the Rule (by its terms) exempted intent; so also, if the Committee Bill becomes law, the Second Circuit would not be free to exempt intent, because the statute includes it.

In my opinion, you should veto this bill. I would appreciate any consideration you can give to my views. If any member of your staff has questions, please do not hesitate to call me at 212–998–6000.

Best of luck in this and all things. Love to all.

Sincerely,

JOHN SEXTON.

EXHIBIT 2

COLUMBIA UNIVERSITY IN
THE CITY OF NEW YORK,
New York, NY, December 6, 1995.

The PRESIDENT,
The White House,
Washington, DC.

DEAR MR. PRESIDENT: I am writing with regard to the proposed "Private Securities Litigation Reform Act of 1995" (the "Act") in light of the November 28, 1995 Proposed Conference Report and the accompanying "Statement of Managers", which constitutes its primary legislative history.

The special focus of my letter is on the proposed "safe harbor for forward-looking statements" that the Act would codify. Although there are other serious problems with the Act, it is this area where its deficiencies are the most glaring and where the recently drafted legislative history most clearly distorts the original intent of the proponents of such a safe harbor. Over the last two years, I have repeatedly testified before Congressional committees on the subject of securities legislation, have drafted a proposed administrative "safe harbor" rule at the request of the SEC, and have served as an informal consultant to attorneys on the staff of the White House counsel on the subject to such a safe harbor. Throughout this process, I have strongly supported the desirability of such a safe harbor, believing that it will encourage fuller disclosure from issuers who would otherwise be chilled from making projections by the threat of private civil liability. Unfortunately, I believe the formulation of the proposed "safe harbor" in Section 102 of the Act, when read in light of its legislative history, does the reverse. That is, its adoption would seriously erode the quality of disclosure in our national securities markets and, in some cases, would give issuers a virtual "license to lie".

Simply put the core problem is that the Act's safe harbor, as finally drafted, does not require the issuer to identify the substantive factors known to it that are most likely to cause actual results to differ materially from projected results. Rather, the issuer could simply provide a representative list of "important factors" that could cause actual results to differ materially from projected results. Thus, for example, an issuer might be aware of ten factors that could cause its projection to go awry and could deliberately list only the third, fifth, seventh and tenth most important factors, intentionally omitting the first, second, fourth factors (or three out of the first four). This outcome is very different from what would be tolerated today by the federal courts, because these courts have crafted a protective doctrine (known) as the "bespeaks caution" doctrine) to shelter issuers from liability when their projections prove materially inaccurate. However, this judicial doctrine applies only when the projection is accompanied by cautionary language that is "specifically tailored" to the actual projection made and the special risks faced by the issuer. Not only does the Act lack any requirement that the cautionary statements be in any respect ''tailored'' to the projections made, but its legislative history now makes clear for the first time (and at the last minute) that the issuer need only disclose some of the reasons known to it why the projection may prove false (and apparently not the most important such reasons). In this light, rather than simply codify the emerging ''bespeak caution'' doctrine, it is much closer to the trust to say that the Act overrules that doctrine.

To understand this assessment, it is necessary to focus briefly on the legislative language and its accompanying legislative history. Under proposed §27A (and also under a companion provision that amends the Securities Exchange Act of 1934), a defendant cannot be held liable in a private action with respect to a forward-looking statement if and to the extent that either of the following occurs:

(A) The forward-looking statement is identified as such and ''is accompanied by meaningful cautionary statements identifying important factors that could cause actual results to differ materially from those in the forward-looking statement;'' or

(B) the plaintiff fails to prove that the defendant (or certain officers thereof) had ''actual knowledge . . . [of] an untrue statement of a material fact or omisssion of a material fact. . .''

Thus, even if knowingly false statement is made, the defendant escapes liability if ''meaningful cautionary statement'' are added to the forward-looking statement. This is bad enough, but under the proposed legislative history there now appears to be no obligation to disclose the most important reasons why the forward-looking statement may prove false (so long as some ''important factors'' are indicated). Specifically, the Statement of the Managers directs:

''Failure to include the particular factor that ultimately causes the forward-looking statement not to come true will not mean that the statement is not protected by the safe harbor. The Conference Committee specifies that the cautionary statements identify ''important' factors to provide guidance to issuers and not to provide the opportunity for plaintiff counsel to conduct discovery on what factors were known to the issuer at the time the forward-looking statement was made. . . .The first prong of the safe harbor requires courts to examine only the cautionary statement accompanying the forward-looking statement. Courts should not examine the state of mind of the person making the statement.'' (at pp. 17–18).

On this basin, a court would not be able to ascertain what ''important factors'' the issuer was aware of but failed to disclose. It is at least arguable than if the issuer disclosed factors that were ''important'' but not among the top four or five reasons why actual results might deviate materially from predicted results, such disclosure would still satisfy this standard. Simply put, no public policy justification can support such selective disclosure of the less important factors while withholding the most important.

Throughout the legislative drafting process, the managers of the Act have argued that their safe harbor provision largely codified the ''bespeaks caution'' doctrine, but just avoided overly exacting (and litigation-promoting) terms, such as ''specifically tailored.'' Perhaps, it was understandable those fearful of an excessive incentive to litigate would wish to avoid such a formulation. Thus a weak compromise was reached under which the disclosures would only have to include ''meaningful cautionary statements.'' Now, however, with the appearance of the legislative history, even that compromise has been undercut by language suggesting that only a few representative factors need be disclosed.

The impact of this change is shown by the following entirely realistic examples:

1. A biotech company, whose future depends on the development of a new drug, projects that it will be in the market within 18 months, but acknowledges that this projection is subject to the uncertainties of FDA approval. However, it fails to disclose that the FDA has just questioned the adequacy of its tests and suggested that a new round of testing may be necessary.

2. A company projects a 50% increase in its earnings for the next year and specifies that this projection is conditioned on (i) the current level of interest rates, (2) continued high demand for its products, (3) the availability of certain scarce supplies, and (4) its ability to obtain adequate financing from its lenders to exploit business opportunities. Omitted from this list of important factors is the critical factor that 50% of its sales come from a single contract with a major customer, who has experienced major business and financial difficulties and has sought to renegotiate its future payments, claiming that it might be unable to pay for future deliveries.

In both these cases, some ''important factors'' are disclosed, but the critical facts are omitted. Under current law, the forward-looking statements would not be protected, because the cautionary statements were not ''specifically tailored.'' However, under the Act, they may be insulated from private liability—with the result that the securities market will become somewhat more ''noisy'' and less transparent and investors will have to discount projections for the risk that material information was not disclosed.

So what should be done? Ultimately, the options at this point are limited. Nonetheless, I suggest that there are two options that do not require the sacrifice of the federal securities laws' traditional objective of full and fair disclosure:

(1) Veto Plus An Administrative Rule. The President could veto the Act, but simultaneously announce the promulgation by the SEC of an administrative safe harbor rule that protects forward-looking statements so long as the principal risk factors known to management at the time the forward-looking statement is made are disclosed (along with any material facts bearing on these risk factors); or

(2) Signature Plus An Administrative Rule. The President could sign the Act, but instruct the SEC to adopt an interpretative rule defining what constitutes adequate ''meaningful cautionary statements'' for purposes of the Act's safe harbor. This administrative definition would, of course, require an issuer to identify the principal factors known to it that are in its judgment most likely to cause actual results to deviate from projected results.

This second option deserves a brief word of explanation. Although the legislative history in the Statement of Managers is adverse, it is not decisive. Nothing in it clearly prohibits an SEC interpretative rule along the lines indicated above. In any event, the Supreme Court is divided on the weight to be given to legislative history. Particularly because the term ''meaningful cautionary statements'' is not self-evident, but has soft edges, courts are likely to give substantial discretion to an administrative agency to define the critical terms in the statute under which it operates. See Chevron, U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984) (agency has substantial powers to resolve legal ambiguities in its statute and federal court should give deference to its greater expertise).

The advantage of this latter approach is that allows the other provisions of the Act to take effect. Although I and many others also have problems with these provisions, they are of a lesser order of magnitude.

to sum up, the latest changes and associated legislative history has made a bad provision worse. I, therefore, urge you to either veto the Private securities Litigation Reform Act of 1995, or sign it only after receiving the assurance of the SEC that it can and will correct the excesses of the safe harbor provision through administrative rule-making.

Respectfully submitted,

JOHN C. COFFEE, Jr.

COLUMBIA UNIVERSITY IN THE CITY OF NEW YORK,
New York, NY, December 13, 1995.

Re private Securities Litigation Reform Act of 1995 (the ''Act'') Safe Harbor Provisions.

BRUCE LINDSEY, *Esq.*
Associate White House Counsel, The White House,
Washington, DC.

DEAR MR. LINDSEY: This is a follow-up to my letter to the President of December 6, 1995, in which I voiced my criticisms of the ''safe harbor for forward-looking statements.'' While I stated (and continue to believe) that the safe harbor provisions represent the most glaring deficiency in the Act, I also suggested that these problems could be substantially corrected by SEC rule-making. Subsequently, I have been asked to clarify my views on the SEC's authority to adopt a definitional rule in light of the legislative history that will accompany the Act (which I had reviewed but did not specifically discuss in my earlier letter).

Initially, it should be noted that both the Securities Act of 1933 (in Section 19) and the Securities Exchange Act of 1934 (in Section 3(b)) delegate broad authority to the SEC ''by rules and regulations to define technical, trade, accounting, and other terms used in this title, consistently with the provisions and purposes of this title.''[1] Indeed, the Commission used this authority over a decade ago to adopt a ''safe harbor for forward-looking information.'' See SEC Rules 175 and 3b–6 (''Liability for Certain Statements by Issuers'').

My suggestion was that the SEC could adopt a new rule under both the 1933 Act and the 1934 Act to define what constituted ''meaningful cautionary statements.'' I asserted that the Supreme Court's decision in *Chevron, U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. §837 (1984) indicated that courts would be required to deter to such an agency rule. As I understand it, some concern has been raised as to whether the legislative history to the Act so clearly indicates a contrary Congressional intent on this question as to preclude such a rule. this letter is intended to address this concern.

Under the *Chevron* decision, judicial review of an agency's construction of the statute that it administers has two stages. First, the court considers ''whether Congress has directly spoken to the precise question at issue.'' Id. at 842. Second, ''[i]f * * * the court determines Congress has not directly addressed the precise question at issue,'' the court determines ''whether the agency's answer is based on a permissible construction of the statute.'' Id. at 843. In this latter inquiry, substantial deference must be given to the agency's greater institutional expertise.

[1] This is the language of § 3(b); § 19(a) of the 1933 Act has some immaterial differences, which, if anything, give broader authority to the SEC ''to make, amend, and rescind such rules and regulations as may be necessary to carry out the provisions of this title.

Let us suppose then that the SEC were to adopt a definitional rule defining ''meaningful cautionary statements'' so as to require the corporation seeking to rely on the statutory safe harbor to ''identify those substantive factors then known to the corporation's executive officers that were in their judgment most likely to cause actual results to differ materially from the results projected in the forward-looking statement.''[2]

Obviously, the first issue is whether the legislative history indicates that Congress has directly spoken to ''the precise question at issue.'' Whether ''the precise question'' be broadly defined as the meaning of ''meaningful cautionary statements'' or more narrowly defined as whether such statements should indicate the most important reasons why actual results may deviate from predicted results, my answer is the same: Congress has not spoken to either question. Reviewing the Statement of Managers, one finds only two statements that address these issues, even indirectly. First, at p. 17, it states:

''The Conference Committee expects that the cautionary statements identify important factors that could cause results to differ materially—but not all factors. Failure to include the particular factor that ultimately causes the forward-looking statement not to come true will not mean that the statement is not protected by the safe harbor.''

This understandable position does not, however, conflict with an SEC definition that required the issuer to identify the most important factors then known to it. Logically, the failure to identify the particular factor may have been because that factor was remote and unlikely to occur (i.e. number thirteen on a list of fifteen recognized factors). Hence, there is no necessary conflict. Moreover, the proposed rule could accommodate this point by expressly providing that the failure to identify the particular factor would not be decisive if the issuer had not perceived it to be among the most important factors (ranked either in order of probability of occurrence or magnitude of the consequences if it occurred) or had identified several other factors that it considered to be of greater importance. Put simply, a Congressional intent to permit omission of the actual factor does not preclude a rule requiring disclosure of the most important factors.

A second and more oblique statement of Congressional intent may arguably be inferred from the Statement of Managers' attempt to limit discovery. At pp. 17–18, that statement directs:

''The Conference Committee specifies that the cautionary statements identify 'important' factors to provide guidance to issuers and not to provide an opportunity for plaintiff counsel to conduct discovery on what factors were known to the issuer at the time the forward-looking statement was made. * * * The first prong of the safe harbor requires courts to examine only the cautionary statement accompanying the forward-looking statement. Courts should not examine the mind of the person making the statement.''

Initially, it should be observed that the above language addresses only discovery and not the substantive content of the ''meaningful cautionary statements.'' Moreover, this language may be in direct conflict with the statutory language (in which case the statute should trump the legislative history). Both Sections 27A((f) and 21E(f) expressly authorize discovery ''specifically directed to the applicability of the exemption provided for in this Section.'' Nonetheless, someone may potentially argue that this hostility to discovery as to issuer's state of mind precludes a rule requiring the ''meaningful cautionary statements'' to identify the most important risk factors then known to the issuer. This seems a weak and very inferential claim. Even without discovery addressed to the issuer's state of mind, a court can assess whether the factors most likely to cause a projection not to be realized have been disclosed. Indeed, one possible answer to this objection is to frame the definition in terms of disclosure of the factors that a reasonable person in the corporation's position would have foreseen as being most likely to cause actual and predicted results to deviate materially. Then, the focus becomes objective and not subjective, and there is no conflict with the Congressional prohibition on discovery as to the corporation's state of mind. Discovery could then focus on whether the risk factors were generally recognized in the relevant industry (without focusing on the issuer's state of mind). In short, both objections to the proposed rule can be easily outflanked.

This then takes us to the second level of analysis: is the SEC's interpretation ''based on a permissible construction of the statute?'' See *Chevron, U.S.A.* v. *Natural Resources Defense Council*, 467 U.S. at 843. If it is, ''a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency,'' Id. at 844. There seems no need to belabor the reasonableness of requiring disclosure of the factors most likely to cause the projection to go awry. Disclosure of remote factors would indeed not be ''meaningful'' because it would not convey an accurate sense of the relevant risk level.

Independently, I should note that respected legal commentators have recently stressed the role of presidential interpretations in the proper judicial construction of a statute's meaning. See Thomas W. Merrill, Judicial Deference to Executive Precedent, 101 Yale L.J. 969 (1992). While it is not necessary to rely on this ''executive precedent model,'' its availability could be strengthened by a contemporaneous statement by the President as to how he believes the term ''meaningful cautionary statements'' should be read. Such a declaration is not necessary, but cannot hurt.

I hope these comments are useful. If I can be helpful in any way, please do not hestitate to contact me.

Yours tryly,

JOHN C. COFFEE, Jr.

Mr. DOMENICI addressed the Chair.

The PRESIDING OFFICER. The Chair recognizes the Senator from New Mexico.

Mr. DOMENICI. Parliamentary inquiry, Mr. President. There are no time limits on this yet, are there?

The PRESIDING OFFICER. There are no time limits.

Mr. DOMENICI. Have we agreed on the time to vote yet?

The PRESIDING OFFICER. We have not.

Mr. DOMENICI. Mr. President, I am pleased to have an opportunity to speak before 1 o'clock, because I will not be back on the Senate floor for a few hours after that. I thank the floor manager for accommodating me, and I thank the Senate for giving me this chance to talk for just a few minutes.

I think the issue is pretty simple, although my good friend from Maryland can, indeed, make it very complex with reference to rules of procedure, cites of precedent and Federal rule requirements. This issue is very simple, we have a situation in the country where many who want to sustain the President's veto talk about saving, protecting the investors so that lawsuits can be filed on their behalf against those who would perpetrate fraud against them as the management or executive part of a corporation. The scenario is ''people need protection because somebody is going to do them in.''

Let me tell you, the basic problem is that the system we have right now does in the investor and it does in the company. It does the stockholder in, whether it is a small stockholder or somebody who is in one of the giant investment groups in the country as a stockholder. Remember, there are always shareholders on both sides of a case. The nonsuing shareholders receive lower dividends and lower stock prices when their companies are sued in these class actions. And the members of the plaintiff class don't do too well either. The ones who do well are the class action lawyers. The attorneys run these cases, decide who to sue and when to settle. According to the Millberg Weiss data that were submitted to the U.S. Senate, and it was not a submission that we easily obtained, the problem is that if you collect total damages in one of these suits and let us just say it is a dollar—it is never a dollar, it is more like $30 million—if it is a dollar, 14 cents of that goes to the investors. I am not saying that the entire 86 cents goes to the lawyers, but it does not go to the investor.

Essentially, there is a lot going on behind that simple fact. There are many factors that affect what is going on in the litigation cosmos against corporations on the so-called behalf of the so-called stockholders. But, in essence, the system we have is not working. In fact, it is detrimental to the people we allege we are trying to protect by a Federal court-made rule, the private right of action under Section 10b.

There is no statutory law in America that created class action lawsuits under section 10b of the Securities and Exchange Act of 1934.

The courts created the implied private right of action as a method of getting justice and expediting matters so that each stockholder, in the case of these kinds of suits, did not have to file their own lawsuits. In the process, let me suggest that it is very simple to come to the floor and say we ought to fix that. It is very simple for my friend from Maryland to come to the floor and say, ''We agree on some things.''

Mr. President, we have been trying to reform the system, in an active way, for at least 5 years. We probably have been trying to fix it for 10 years. But, that I am aware of, we have been actively trying to fix it for 5 years—fix this problem, the problem that lawyers are no longer lawyers in the sense that people understand them to be. They are entrepreneurial lawyers. That means

[2] Of course, this is intended only as a first approximation, but I do not believe that such a rule would be hard to draft.

they are in the business of manufacturing lawsuits and making money, if they can find the situation where a stock price drops and the lawyers can allege fraud. Believe you me, they look for them, they find them, they recruit them, and they use the same plaintiff many times in many suits. They have their favorites. They are called professional plaintiffs or pet plaintiffs.

In one set of facts before the committee last year, we found that a very elderly man—I think he was over 90—owned small amounts of stock in a whole in a large number of corporations because, if he had enough, he would be the favored plaintiff of this new breed of lawyers. In exchange for letting the lawyer use your name, the professional plaintiff gets a bonus payment of thousands of dollars. Entrepreneurial lawyers agree with statements that say, ''Once we get one of these suits, it is wonderful. We do not work for the stockholders, we work for ourselves because our interest becomes how much money can we finally get if a president of a company, an auditor who did part of the work, a CPA that did work, a board of directors that voted it—how many of these can we bring into a lawsuit?'' At some point, they all add up a little money and they have a nice pot, and it is looking good. ''Gee, we might make $10 million, $20 million out of this.'' And now we settle it. And this results, right here on this chart.

My friend from Maryland would say, well, you have come a long way, and many of the provisions in this bill we agree with. But my question is: How long do we have to debate? How many hearings do we have to have? How many Senators do we have to have voting for this? How many House Members do we have to have voting on it—only to find that those that support the President's veto come to the floor and say there is something really bad with what is going on out there. And this is a good bill.

Mr. SARBANES. Will the Senator yield?

Mr. DOMENICI. But the opponents say we did not quite fix it right. Let me suggest to the Senators that are going to vote here tonight, we fixed it about as right as Democrat and Republican Senators—Democrat and Republican House Members, in large numbers—can do with a piece of legislation over a sustained period of time, with a lot of effort. And they did it. As a matter of fact, there has been more bipartisan participation on this bill, and from different spectrums of the ideological makeup of this Congress, than any bill I have seen since I have been here.

It has Senators HELMS, LOTT, and GRAMM voting for it, and it has Senators MIKULSKI, KENNEDY, and HARKIN on the bill and voting for the bill. And then when the bill came back from conference, a wide spectrum of Senators voted for it again.

So, Mr. President, the truth of the matter is—I do not say this to my friend from Maryland, I make it as a broad statement—there are about 90 lawyers out there in the United States—maybe 110, or something like that—that you will never satisfy. They are powerful, they are strong, they have a lot of money, and they are listened to by a lot of people; they make huge political contributions, and everybody knows that. And you will never satisfy them because they like the system as it is.

There is an old gypsy curse that goes like this: ''May you be the innocent defendant in a frivolous lawsuit.'' It is a curse stopping companies from creating good jobs, high-paying jobs. It is a curse for our economy. If it was not the most powerful around, we would probably easily find the enormous damage being done. It is so big and so strong that all we can do is add up all the horror stories and find out that ''something is wrong in Denmark.'' It is a curse of the Silicon Valley, which breeds entrepreneurial companies that have scattered across America and made growth in jobs and competition a reality. All of the high-tech companies are concerned almost every day that the President makes any statements about their company—biotech and high-growth companies.

This issue is the electronics industry's No. 1 issue.

Frankly, you will find them listed by the hundreds—not a few, but by the hundreds—through their chief executive officers, begging the President to sign this legislation. I am sorry he did not. I think he made a very bad mistake.

It has been a difficult job. This bill was first introduced—and it was not as good as it is now—by Senator DODD and Senator DOMENICI 3½ years ago. It was introduced by Senator DOMENICI and Senator DODD, and there was a counterpart in the House sponsored by Congressman TAUZIN. It has been dramatically improved and we are here with it today.

Mr. SPECTER. Will the Senator yield for a question on the President's action?

Mr. DOMENICI. Yes.

Mr. SPECTER. The President, in his veto message, focused on one narrow question. Actually, he focused on three, but they boil down to one. That is, on the somewhat arcane question of pleading. The question goes to the distinguished Senator from New Mexico, whom I compliment for his laborious work here. He is an attorney himself, and he is the proud father of an attorney, as am I.

Mr. DOMENICI. Three attorneys.

Mr. SPECTER. He is the proud father of three attorneys. He only talked to me about one, so I will have to find out about the other two. I want to ask the Senator from New Mexico a question which relates to the core problem here about the requirements on proving state of mind, where the President's veto message takes up this question, with the conference report adopting the toughest standard in existence, the standard of the second circuit. But the conference report dropped an amendment which this Senator had offered, which was approved by a substantial majority, 57 to 42, codifying the second circuit's method of proving state of mind. And then the conference report also added the requirement that state of mind be pleaded with particularity, which is a direct contradiction to the general rule of civil procedure that state of mind be averred generally as opposed to fraud, which has to be pleaded with particularity.

Now, this is classified as an arcane subject, which means very few people know anything about it. The President called me the night before last because I had written to the President—and I will go into this a little more when I seek the floor on my own behalf—but in the context where you have a short statute of limitations, where you have the unique—not unusual, but unique—provision in the law for a mandatory stay of discovery when a defendant files a motion to dismiss, so that you have a requirement that the plaintiff plead with particularity facts on the defendant's state of mind. Does that not go too far in closing the courthouse door to plaintiffs? I say that without an ax to grind, and with some substantial experience as a practicing lawyer, although not in class action fields for the plaintiff. I represented some defendants in securities act litigation.

As I take a look at the current state of the bill, different from the bill passed by the Senate, the President raises three points which would change in the conference report, but they boil down to this extraordinarily high standard of pleading. Is it fair to require investors in a field where we have stock security transactions, approximating $4 trillion in this country each year, bearing in mind the gross national product in this country is——

Mr. DOMENICI. I have great respect for the Senator, but I would like him to ask the question.

Mr. SPECTER. Is it fair to have that kind of particularity required in that bill?

Mr. DOMENICI. I think it is fair. My answer is briefer than your question but let me insert in the RECORD a letter dated October 31, from the U.S. Court of Appeals for the Third Circuit, Judge Scirica, circuit judge. He writes on behalf of the Judicial Conference.

One portion of the concern you have, as expressed by the Senator from Pennsylvania, is that the Senate Banking Committee provision provided that the complaint must ''specifically allege facts giving rise to a strong inference.'' The conference report states that the complaint must ''state with particularity the facts giving rise to a strong inference.''

The reason we put in ''state with particularity the facts giving rise to a strong inference'' is because that is what Judge Scirica, speaking on behalf of the Judicial Conference, asked Congress to do. He indicated in this letter that he thought—and he was speaking for many others that are concerned about pleadings—that it was more appropriate to say ''state with particularity facts giving rise to a strong inference'' as compared with ''specifically allege facts giving rise to a strong inference.'' That is the change made, and it was made at the suggestion of an eminent jurist.

Now, let me complete my remarks. The point I want to make is that there have been many Senators on both sides of the aisle work on this legislation. I want to thank Senator DODD, in particular, for the tremendous effort he made in behalf of this legislation. I am not sure, Mr. President, and I say this to all of those who are out there in America—and they are by the hundreds of the thousands—who were overjoyed when this bill passed the Senate and passed the House and who will be overjoyed tonight if we override the President. Without Senator DODD, we would not have made it.

Second, there is no doubt that without the tremendous efforts put forth by the chairman of that committee, the Senator from New York, Senator D'AMATO, who started out skeptical and ended up powerfully on the side of common sense and protecting our investors while we protect our corporations from the abuses of a burgeoning entrepreneurial litigation complex out there where lawyers decide who get sued, when cases are settled, when they have gotten enough out of the system, to take it and run, and when the end product is that they and the process take most of the money.

I am delighted that those two Senators—there are many others—decided to take this thing to heart. I had an early role, and I can tell you my role came because I read about this litigation. I had no interest. I just have a lot of time traveling from here to New Mexico and occasionally I read—not often—and I read one story and it enticed me to read two, and finally I read three or four major stories, exposés, stories, about this burgeoning type of American litigation. I could not believe that nothing could be done about it.

Frankly, I set about to draft a bill. Senator DODD actually was not the first cosponsor. Actually, Senator Sanford was my first cosponsor. That only lasted 3 or 4 months, and then Senator DODD came on board. We have had nothing since then but a difficult battle. We have had advertisements, we have had millions spent talking about what evil people we are, how we are taking things away from the small investors of America. Who are we trying to protect? Obviously, not average folks.

I am very, very pleased that for once there was a countervailing message out there from people who know we have fixed some abuses that should not go on in this country under the name of using the courts to protect small investors. We do not have to have that kind of system. Today, if the vote goes right, we will strike—without question, we will restore integrity to our securities litigation reform system—a giant strike will be made for commonsense, reasonable litigation in America, instead of litigation that goes to the extreme as far as the minds of bright lawyers can carry. There are many who think that is the way the system ought to evolve. I do not believe so. I do not think we ought to put to work the genius of our minds in figuring out how to litigate to get something out of the system. That is what I think has happened. I think we will fix that.

There are 182 Members of the House from both sides of the aisle as original cosponsors. There were 52 in the U.S. Senate as original cosponsors. I must say, in all honesty, the bill is much better now than when they cosponsored it. In fact, I must say it is even better for that portion of the plaintiff's bar that chooses to participate in this kind of litigation. It is better for them, too because they will be forced to be better lawyers and to make the merits matter.

I came to the floor just to express a few remarks. We will be here for perhaps a few hours. I also want to say the President's veto message leads me to conclude that we ought to pass this legislation. I do not see in this message from the President a scathing attack on the legislation. I see some very technical points. Frankly, a statement that the managers report might go too far. I do not know—I say this with a degree of caution, but I am not sure that I have seen a President veto a bill on the basis of what is in the statement of managers, but maybe I am wrong. I would not think Presidents would do that. I do not think this President intended that. A statement of managers is not law, everyone knows that. Interpretation will evolve over time, without any question. There are more than 12,000 words in this bill and the President quibbled with 11 of them. I know this because Senator DODD did the analysis.

I ask unanimous consent that the October 31 letter from the third circuit be printed in the RECORD.

There being no objection, the material was ordered to be printed in the RECORD, as follows:

U.S. COURT OF APPEALS,
THIRD CIRCUIT,
October 31, 1995.

MS. LAURA UNGER,
MR. ROBERT GIUFFRA,
Senate Committee on Banking, Housing and Urban Affairs, Washington, DC

DEAR LAURA AND BOB: I have a few suggestions for your consideration on the Rule 11 issue.

Page 24, line 11: Insert ''complaint'' before ''responsive pleading.''

Page 24, line 19: Insert ''substantial'' before ''failure.''

''Complaint'' would be added to item (i), so there is a clear provision that reaches any failure of the complaint to comply with Rule 11. A small offense would be met by mandatory attorney fees and expenses caused by the offense; if item (ii) is modified without this change, a gap is left in the statutory scheme. The result still is a big change from present Rule 11, which restricts an award of attorney fees to a sanction ''imposed on motion and warranted for effective deterrence.'' A serious offense—filing an unfounded action—would be reached under item (ii).

I also wish to confirm our prior conversation on scienter and the pleading requirement.

Page 31, line 5: Delete ''set forth all information'' and insert in its place ''state with particularity.''

Page 31, line 12: Delete ''specifically allege'' and insert in its place ''state with particularity.''

As I indicated, this would conform with the existing language in Rule 9(b) which provides that ''the circumstances constituting fraud or mistake shall be stated with particularity.''

Also, page 24, line 1: Delete ''entering'' and substitute ''making.''

Page 24, line 4: Delete ''of its finding.''

Many thanks.

Sincerely,

ANTHONY J. SCIRICA.

Mr. SPECTER. Mr. President, I have sought recognition to amplify some of the comments and some of the issues which I had raised in the question I posed to the distinguished Senator from New Mexico.

The narrow issue which has been raised in the President's veto message is one of enormous importance but is generally not understood unless someone has delved into the intricacies of the legal pleadings, which are, candidly, not well known, not of very great interest, but are very, very important. The issue arises in a historical context where at common law lawsuits which had great merit on the substance were thrown out of court because lawyers did not put in an adequate written pleading—a pleading is a document that is filed to start a lawsuit—because lawyers, acting on behalf of clients, did not put enough in the pleading to satisfy the requirements of law.

Most people do not really understand what the litigation process, the civil litigation process is all about. There is enormous publicity on the O.J. Simpson case, and television and radio and books talk a lot about criminal trials, but very few really go into detail on what happens in a civil lawsuit. But that is a process where one person sues another, or corporations may be involved as parties, in order to assert a cause of action or a claim for relief based on a civil wrong, where a remedy is sought. It may be money damages or an injunction to stop someone from doing something.

In the old common law, many people who had been severely injured were not given a day in court because their lawyers did not put down the proper words. There is a famous textbook, Chitty on Pleading, to tell you how to write the pleadings. These problems have been carried over to the present day. As a younger lawyer, I went to the prothonotary's office in Philadelphia. On many occasions I had my complaints returned for failure to go into the kind of specificity needed.

The leading architect, the draftsman of the Federal Rules of Civil Procedure, was a Yale Law School professor named Charles E. Clark. Charles E. Clark later became the dean of the Yale Law School and he later became a distinguished judge on the Court of Appeals for the Second Circuit and ultimately was the Chief Judge there. Judge Clark felt so strongly about civil procedure that he took time from his busy schedule to continue to teach a class at the Yale Law School long after he left as dean and was a distinguished Federal judge. I had the good fortune to have Judge Clark as a professor on civil procedure.

Judge Clark, in a very eloquent way—and I wish he were on the floor today to talk about his deep feelings about procedure and the work that he had done—spoke about the unfairness of having highly technical rules of pleadings which stop people who have valid claims from getting into court. He developed, in the Federal Rules of Civil Procedure, what is called ''notice pleading.'' It was a very famous case, DiGuardia versus Gurney, that involved a man who was injured, wrote something on a slip of paper and filed it in Federal court, and that was sufficient to start a lawsuit, start the process. The defendant obviously objected. He wanted a lot more specification. What he really wanted to do was to win the lawsuit. He wanted to get the plaintiff, DiGuardia, out of court. But that is why we have judges who make decisions.

The distinguished Senator from New Mexico made a statement that ''the lawyers decide when cases are settled.'' It is not true. These class action cases are not settled until judges decide when the cases are going to be settled and when the cases are going to be concluded. These actions all require court approval. If one person sues another, he can discontinue the lawsuit by simply filing a praecipe, or paper saying the lawsuit is over. But in class actions the lawyers do not decide these matters, they are decided by judges. The Federal Rules of Civil Procedure were set up in an elaborate way to provide fairness, to give both parties a fair chance.

There is an interesting editorial in today's USA Today, commenting about this arcane, esoteric subject. The caption of it is, ''Sorry Securities Law.'' The key sentence is, ''President Clinton did something smart this week. He sided with investors and taxpayers in a battle for fair securities litigation reform.''

I ask unanimous consent this editorial be printed in the CONGRESSIONAL RECORD, following my remarks.

The PRESIDING OFFICER. Without objection, it is so ordered.

(See exhibit 1.)

Mr. SPECTER. The essence of my concern, albeit narrow, is very, very important, and that is what this conference report coming back from the conferees provides on how pleadings are articulated, bearing in mind that this has an enormous impact, a controlling impact on the litigation.

When this bill was before the Senate, I offered an amendment which would give some direction to how plaintiffs met a very strong pleading requirement, which was taken from the Federal Court of Appeals for the Second Circuit. It has jurisdiction over New York, Vermont, and Connecticut, and many of the big security cases are brought there. Everybody agrees that the Second Circuit has articulated the toughest standard around. That has been accepted.

When I read the decisions of the court of appeals, I noted that the court of appeals had pointed out how this tough standard could be satisfied, and I offered an amendment, which was opposed by the managers. I had a little discussion with the distinguished Senator from Utah, Senator BENNETT, who was managing the bill that day. And my amendment was adopted by the Senate by a pretty convincing vote, 57 to 42—which is a big vote around here, when the managers are opposed to it and you have about 60 cosponsors.

That amendment provided as follows:

> The required state of mind may be established either by alleging facts to show the defendant had both motive and opportunity to commit fraud, or by alleging facts that constitute strong circumstantial evidence of conscious misbehavior or recklessness by the defendant.

That was adopted by a strong vote in this body. Why was it adopted? Because, while the Senate agreed that we ought to have a tough standard on pleading, the Senate said we ought to look to the same court which established that pleading standard which explained how the proof would be made. But this important provision was dropped in the conference. That means the conferees did not like it. There was a little feeding frenzy as to how this legislation is finally crafted, in my opinion. There is a little feeding frenzy going on in a lot of subjects in the Congress today.

Not only was this important provision dropped, but the conference report came back and made it even tougher, saying that plaintiff had to plead ''with particularity'' the facts giving rise to a strong inference that the defendant acted with a certain state of mind.

This is a little tough, but I hope my colleagues, who will be voting on this matter, will follow this, will listen to it—or the staffs will.

In the context of what the Federal Rules of Civil Procedure provide, and these are worked out by the judges and by the rules committee of the Judicial Conference after years of experience as to what is fair, rule 9(b) of the Federal Rules of Civil Procedure requires that fraud be pleaded with particularity. That is where you have fraud.

But the same rule, when dealing with state of mind, says that the particularity pleading is not required because it is unrealistic. That rule says that state of mind can be ''averred generally.'' Here we come back with legislation on this subject which virtually closes the courthouse door to plaintiffs in legitimate cases, where there are very important issues and very important damages.

When the distinguished Senator from New Mexico, Senator DOMENICI, was saying that hundreds of thousands of people will be pleased with overriding the President's veto, I would respond that millions of Americans will be displeased when they understand that what the Senate has done here is to make it virtually impossible for them to get a case into Federal court.

These are not trivial matters. It is hard to comprehend the enormous billions and trillions of dollars which we talk about in the Senate. The gross national product of the United States of America—that is what everybody produces, all the cars, washing machines, and the services—what everybody produces in this country amounts to $7 trillion, everything that goes on in this country. The transactions on the stock exchanges, the sale of stock, approximate $4 trillion.

We are not talking about a small group of lawyers, or a hundred thousand people who Senator DOMENICI says will be pleased if we override the President's veto. We are talking about millions of people in America who invest in stocks and bonds and who need to be treated fairly. We are talking about the greatest country in the world with an economic development which has developed a corporate mechanism, the corporate machine for acquiring capital by stock offerings on the basis of fairness where we have laws which say what the offerors must do in terms of honest representations. These are matters involving enormous sums of money.

Just a few of the cases are:

Wedtech, which involved a matter where investors recovered $77 million of their losses which had exceeded more than $100 million in a class action suit;

Platinum Software, where investors lost over $100 million, recovered $22 million in a class action suit against the company for overstating revenues;

The famous Charles Keating, American Continental, Lincoln Savings case where a jury awarded $4.4 billion against Mr. Keating and others for fraud;

The Drexel Burnham Lambert case where a New York securities law firm settled the claims of 40,000 class members who had invested in municipal bonds underwritten by Drexel for $26.5 million. Drexel subsequently went bankrupt in the aftermath of the Michael Milken insider trading scandal;

A matter pending today involving investors in Orange County municipal bonds who lost more than $1.5 billion due to the high-risk trading and investment strategy pursued by Orange County, and suit is currently pending;

Hedged Investments Associates, a $40 million settlement against Kidder, Peabody and Morgan Stanley to resolve a class action brought on behalf of 1,000 investors, mostly elderly retirees who had sustained losses of $72 million where there was a Ponzi-like scheme;

The case of LA Gear, an athletic equipment maker, a class action settled for over $35 million to resolve a suit over allegations of a false public statement about stock value;

Chambers Development suit settled for $75 million on allegations of false statements by management over corporate earnings and accounting methods;

The Washington Public Power Supply System, 26,000 investors were defrauded of over $2 billion for fraud in selling bonds using false information, and over $800 million was recovered in a class action suit.

This is a very brief statement illustrating the kind of problems for which these cases are brought.

Let me point out, Mr. President, that President Clinton has committed to signing the bill with three changes which would leave the reform program provisions essentially intact.

There would be reform of joint liability, which has been urged by many. That stays in. Safe harbor for forward-looking nonfraudulent statements which turn out to be incorrect—that change stays in. The elimination of liability under RICO, something which should have been changed a long time ago, stays in. Procedural changes to make certain that the plaintiffs, rather than their attorneys, control the litigation stays in.

The Wall Street Journal has an interesting comment in today's edition saying that only one of the three major—let me read a paragraph. It is relatively brief. ''While supporters [that is, supporters for the bill] weren't admitting it publicly yesterday, only one of the three major interest groups pushing the bill, the high technology companies often targeted for fraud suits, regard the bill's strict pleadings standards as essential. The other two groups, accounting and securities firms, are more interested in other aspects of the lawsuit-limiting bill such as limits on their financial liability.'' And those would all be retained.

President Clinton went into this pleading issue in some detail. He filed a short three-page veto message. But I can personally attest to the thoroughness of the President's analysis of this issue because he called me on Tuesday night, night before last, rather late, 10:15 at night, and told me that he was issuing a veto message and made a comment that a letter which I had written him on December 8 this year had brought to his attention matters that he had not previously understood.

The letter which I wrote to him said, in part, that I urged the veto because of the restrictive method of pleading scienter; that is, knowledge on the behalf of the defendants, and talking about the sanctions which could be applied and the strong limitations on plaintiffs' suits where you have this extraordinary standard of pleading, the short statute of limitations, and the mandatory review for sanctions under rule 11, which would so discourage any litigation from being brought. And, at the bottom of the letter, I printed in longhand this note: ''Going back to my roots on studying this issue at the Yale Law School, I think that my Federal procedure professor—Judge Charles Clark—would roll over in his grave to see the specific pleading standard in this bill, prohibition on discovery until a motion to dismiss is denied, and the chilling sanctions. Your veto would send it back for important revisions.''

When the President called—and we had a conversation lasting about half an hour—he went in into these pleading provisions in detail, and talked about his own procedure professor at the Yale Law School, fully understood precisely what he was doing, and said in his veto message that he was prepared to sign the bill and supported the goals of the bill but thought it unfair to virtually close the courthouse door with these requirements.

Mr. President, I ask unanimous consent that the following documents be printed in the RECORD following my statement:

No. 1. My letter to the President dated December 8, 1995;

No. 2. The President's veto message dated December 19;

No. 3. My ''Dear Colleague'' letter dated December 20;

No. 4. The article in the Wall Street Journal of today, December 21; and

No. 5. The editorial in USA Today dated December 21, today.

The PRESIDING OFFICER. Without objection, it is so ordered.

(See exhibits 1, 2, 3, 4, and 5.)

Mr. SPECTER. Mr. President, in conclusion, the two most popular words of any speech, I ask my colleagues and the staffs just to take a look at what we are doing here. The President is prepared to sign a bill and to sign into law very substantial changes in the securities fields which have been urged and would become law—limitations on joint liability, reforms, so-called, in the safe harbor provisions, the elimination of liability under RICO—and I have had many people, especially the accountants, urge that change be made—procedural changes to ensure plaintiffs, not their attorneys, control the litigation; really very major and enormous changes.

But this one provision as to how you state your case is just unfairly, unduly restrictive in this bill because it turns the Federal Rules of Civil Procedure on their head. It turns in a revolutionary way—more than revolutionary, really destructively revolutionary—the established rules of notice pleading. It strikes the amendment which this body had adopted on my introduction telling people how to meet the tough standard of specific pleading and then adds to it a particularity requirement which makes it a virtual impossibility that sufficient facts can be alleged and in a unique way cuts off discovery. The only situation like it that I know about. It mandates the cut off of discovery when a motion to dismiss is pending, because characteristically and especially when you want to get inside somebody's head you cannot do it unless you ask them a question or two.

So this is something of really enormous importance. What we would be doing in effect is returning to a common law pleading standard, the common law of ancient England, probably even tougher than common law in ancient England, which would be closing the courthouse doors on millions of Americans who invest their money. And the long-range effect of what it does to the lawyers is minuscule but not what it will do to investors and what it will do to capital formation in the United States. So I think that if we make these changes, simple but critical, as the President has said he will sign this law and we can move forward in a fair way.

I thank the Chair. I yield the floor.

EXHIBIT 1

[From USA Today, Dec. 21, 1995]

SORRY SECURITIES LAW

Caught between two big Democratic Party contributors—trial attorneys and new high-tech companies, President Clinton did something smart this week. He sided with investors and taxpayers in a battle for fair securities-litigation reform.

Clinton vetoed a bill aimed at limiting frivolous lawsuits against corporations that simply went too far.

As passed last week, the legislation gave a deserving slap to a group of trial attorneys who've literally paid people to start class-action suits against companies whose stocks decline dramatically.

To defend against such suits, companies on average pay $700,000 in attorney fees and lose nearly a half-year's worth of top managers' time. Such high costs especially threaten new high-tech firms. All of Silicon Valley's young electronics companies report being hit by so-called strike suits.

Legitimate investors aren't helped either when lawsuits harass a company in which they've put money.

The bill would benefit investors and business by allowing executives to speak more freely about their plans with less fear of suits if the plans go sour.

That's what securities reform was supposed to be about. But the legislation Clinton vetoed leapt beyond that with provisions that would open the door to fraud.

For example, the bill would allow executives to knowingly deceive investors as long as they included general cautions while hyping products. Thus, a drug company executive talking up a new drug could keep from investors the fact that the government had denied approval of it without risking suit as long as he noted the uncertainty of the drug approval process.

Worse, the legislation also would require investors to provide proof of intent to commit fraud when a complaint is filed. That standard would have kept the government from recovering money from Charles Keating and other savings and loan crooks for their billions of dollars in fraud against depositors and taxpayers.

Those problems are easily remedied. As Sen. Arlen Specter, R-Pa., argues, plaintiffs aren't mind readers. They should only have to show motive and opportunity to commit fraud to lodge a complaint. And honest executives and businesses don't need a safe harbor for lies.

Wednesday, the House foolishly rejected those quick Clinton fixes to the bill and voted to override the veto. The Senate should take Clinton up on them.

Securities laws need to be fair to all, starting with investors and taxpayers.

EXHIBIT 2

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, DC, December 8, 1995.

The PRESIDENT,
The White House, Washington, DC.

DEAR MR. PRESIDENT: This week, both the Senate and the House of Representatives passed the conference report to H.R. 1058, the Private Securities Litigation Reform Act of 1995.

I urge you to veto this conference report. While the bill contains some reasonable provisions to eliminate frivolous securities suits, it goes too far. The bill fails to extend the statute of limitations shortened by the Supreme Court several years ago. It imposes a highly restrictive method for pleading scienter. It provides a mandatory stay of discovery when a motion to dismiss is filed, thereby preventing plaintiffs from discovering salient facts that would allow them to amend their complaints to satisfy the new pleading standard. It requires mandatory review at the completion of each case for sanctions under Rule 11 of the Federal Rules of Civil Procedure and, in what amounts to fee-shifting, provides a presumption that the remedy for any Rule 11 violation in the complaint is reimbursement of the defendants' attorneys' fees.

As a practical matter, this combination of factors will choke off many important law suits to protect innocent investors. In very few cases will either potential plaintiffs or their lawyers have a sufficient interest to justify risking sanctions because, after the fact, a judge decides that they may have violated a stringent and arbitrary pleading standard. I fear that enactment of this bill would represent the end of the private enforcement of the nation's securities laws, which have provided the most stable markets in the world.

I assure you that in the event that you veto this bill, I will support your veto and work to defeat any override effort.

Thank you for your consideration.

Sincerely,

ARLEN SPECTER.

EXHIBIT 3

To the House of Representatives:

I am returning herewith without my approval H.R. 1058, the ''Private Securities Litigation Reform Act of 1995.'' This legislation is designed to reform portions of the Federal securities laws to end frivolous lawsuits and to ensure that investors receive the best possible information by reducing the litigation risk to companies that make forward-looking statements.

I support those goals. Indeed, I made clear my willingness to support the bill passed by the Senate with appropriate ''safe harbor'' language, even though it did not include certain provisions that I favor—such as enhanced provisions with respect to joint and several liability, aider and abettor liability, and statute of limitations.

I am not, however, willing up to sign legislation that will have the effect of closing the courthouse door on investors who have legitimate claims. Those who are the victims of fraud should have resource in our courts. Unfortunately, changes made in this bill during conference could well prevent that.

This country is blessed by strong and vibrant markets and I believe that they function best when corporations can raise capital by providing investors with their best good-faith assessment of future prospects, without fear of costly, unwarranted litigation. But I also know that our markets are as strong and effective as they are because they operate—and are seen to operate—with integrity. I believe that this bill, as modified in conference, could erode this crucial basis of our markets' strength.

Specifically, I object to the following elements of this bill. First, I believe that the pleading requirements of the Conference Report with regard to defendant's state of mind impose an unacceptable procedural hurdle to meritorious claims being heard in Federal courts. I am prepared to support the standards of the Second Circuit, but I am not prepared to go beyond that. Second, remove the language in the Statement of Managers that waters down the nature of the cautionary language that must be included to make the safe harbor safe. Third, restore the Rule 11 language to that of the Senate bill.

While it is true that innocent companies are hurt by frivolous lawsuits and that valuable information may be withheld from investors when companies fear the risk of such suits, it is also true that there are innocent investors who are defrauded and who are able to recover their losses only because they can go to court. It is appropriate to change the law to ensure that companies can make reasonable statements and future projections without getting sued every time earnings turn out to be lower than expected or stock prices drop. But it is not appropriate to erect procedural barriers that will keep wrongly injured persons from having their day in court.

I ask the Congress to send me a bill promptly that will put an end to litigation abuses while still protecting the legitimate rights of ordinary investors. I will sign such a bill as soon as it reaches my desk.

WILLIAM J. CLINTON.

THE WHITE HOUSE, *December 19, 1995.*

EXHIBIT 4

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, DC, December 20, 1995.

DEAR COLLEAGUE: I urge you to sustain the President's veto on the Securities Bill.

The President vetoed the Conference Report because it significantly changed the Senate's version of the Bill. If the Senate changes three provisions, the President has committed to signing a revised Bill which would contain most of the legislative reforms such as: reform of joint liability; safe harbor for forward-looking nonfraudulent statements which turn out to be incorrect; elimination of liability under RICO; procedural changes to insure that plaintiffs, not their attorneys, control cases.

The President vetoed the Conference Report because it established virtually impossible pleading requirements. The President accepted the toughest pleading standard of the Second Circuit on the defendant's state of mind, but the President wanted the Bill to include my amendment (adopted by the Senate 57 to 42) which codified the Second Circuit's standard on how that state of mind could be proved.

That tough pleading standard becomes even more important in the context that the Bill prohibits discovery while the defendant's motion to dismiss is pending. That means that the plaintiff must specify his entire case without the benefit of discovery. That is a virtually impossible pleading standard which turns the Federal Rules of Civil Procedure on their head.

The Conference Report's safe harbor provision excludes liability for knowingly false forward-looking statements. The President would sign a bill which retained the Senate's version.

Sustaining the President's veto would retain most of the reform measures in the Conference Report but will not close the courthouse door to legitimate claims by these draconian pleading standards.

Transactions on the stock exchanges now approximate $4 trillion annually which is more than half the U.S. gross national product.

Fairness to investors requires these revisions in the final bill which would follow the Senate's sustaining the President's veto.

Sincerely,

ARLEN SPECTER.

EXHIBIT 5

[From the Wall Street Journal, Dec. 21, 1995]

HOUSE VOTES TO OVERRIDE VETO OF SECURITIES-SUIT BILL

(By Jeffrey Taylor)

WASHINGTON.—The House voted 319–100 to override President Clinton's unexpected veto of a bill restricting investors' securities-fraud lawsuits, but the bill's supporters may find an override harder to come by in the Senate

Late Tuesday night, Mr. Clinton stunned a coalition of publicly owned companies, accountants and securities firms advocating the bill by vetoing the legislation—after indicating earlier that he planned to sign it. The bill would make it harder for investors to file lawsuits seeking damages when companies' stock prices drop and would limit the liability of accountants and underwriters for fraud by their corporate clients.

An override vote in the Senate may come as early as today. White House aides expressed confidence that Mr. Clinton's legislative staff could muster enough votes to defeat it. The Senate approved the final version of the bill two weeks ago by a 65–30 vote, barely enough for the two-thirds margin needed for an override. Both sides in the debate spent much of yesterday lobbying five senators who voted for the bill but are seen as swing votes.

In addition to his usual Republican adversaries, the president faces some unaccustomed opponents in the override fight including Sen. Christopher Dodd (D., Conn.), the Democratic National Committee chairman who aggressively supports the bill. In a speech to House Democrats yesterday morning, Sen. Dodd urged them to vote for their body's override. And in a terse public statement, Mr. Dodd vowed to ''work hard . . . to enact this legislation into law,'' which would amount to a defeat for his own party's president.

If the Senate override effort fails, the bill's supporters may be forced to reshape the bill to conform with some of Mr. Clinton's concerns about it. The first of these, the president said in his veto message, was that the bill's so-called pleading standards—or the facts investors must establish so courts will let their lawsuits proceed—impose ''an unacceptable procedural hurdle'' to many worthy lawsuits in the federal-court system. Thus, he concluded, the standards would damage the legal rights of defrauded investors.

While supporters weren't admitting it publicly yesterday, only one of the three major interest groups pushing the bill—the high-technology companies often targeted for fraud lawsuits—regards the bill's strict pleading standards as essential. The other two groups—accounting and securities firms—are more interested in other aspects of the lawsuit-limiting bill, such as its limits on their financial liability.

Mr. Clinton appears to have counted on that fact in crafting his veto message. In it, he calls for restoration of an amendment introduced by Sen. Arlen Specter (R., Pa.), who opposes the bill, which would have softened the pleading standards. The amendment was approved by the Senate in June but was dropped in subsequent negotiations to merge the Senate bill with its House counterpart.

In a letter to Mr. Clinton this month, Sen. Specter urged Mr. Clinton to veto the bill and, if he did, promised to help defeat any override effort in the Senate. Sen. Specter, who like Mr. Clinton is an alumnus of Yale Law School, said in his letter that his former federal-procedure professor at Yale would "roll over in his grave to see the specific pleading standard in the bill."

In a statement issued before yesterday's House vote, Rep. Christopher Cox (R., Calif.), one of the bill's architects and most ardent supporters, dismissed the concerns raised in Mr. Clinton's message and painted the veto as a concession to class-action trial lawyers who oppose the bill. Mr. Clinton vetoed the bill, Rep. Cox asserted, "at the bidding of securities lawyers who are some of his and the Democratic Party's biggest donors."

The President's message also criticized the managers' statement that accompanied the bill, in which its congressional supporters explained what their intentions were in drafting it. Mr. Clinton complained about how the managers' statement described a key provision of the bill protecting companies from legal liability for their forecasts about earnings and other matters. The statement, he said, "attempts to weaken the cautionary language" the bill requires for companies to describe factors that might skew their forecasts.

Mr. BENNETT addressed the Chair.

The PRESIDING OFFICER (Mr. KYL). The Senator from Utah is recognized.

Mr. BENNETT. Mr. President, I thank my colleague from Pennsylvania.

If we were not in the veto circumstance we are in, we might well be able to work out some of the issues that he raises. My only comment with respect to some of the comments he made is to remind Senators that this bill deals with forward-looking statements, not with fraud that is committed in terms of reporting inaccurate stock prices, earnings, asset value, et cetera. I hope Members of the Senate and any who are listening will understand the point we have made over and over again, that had this bill been in place at the time of Charles Keating's defalcations this bill would not have prevented a class action suit against Charles Keating. Had this bill been in place at the time of the class action suit brought in Orange County, this bill would not have prevented those class action suits.

There is a clear difference between fraud when one is making a false statement about the performance in the past and forward-looking statements where one is making predictions about the future. That is one of the cruxes here of this argument that has been lost. People have stood in the Chamber again and again and said to those of us who are in support of this legislation, how can you support fraud on the part of corporate executives? The answer is, we do not support fraud on the part of corporate executives. We have never supported fraud on the part of corporate executives.

If I may be somewhat predictive in my forward statements, Mr. President, I see charts that are being set up in the Chamber that we have seen before which make this point, that investors are being defrauded and therefore how can you support legislation that would support this kind of defrauding.

The fact is, stating it once again for the record, we are not talking about the Charles Keatings of this world. We are not talking about that for which Michael Milken was sent to jail, acts where information is hidden from investors or information is distorted to defraud and mislead investors. We are talking about the circumstance where an executive is asked a question about the future and gives his best answer, and then after the fact, if the future does not come to pass the way that executive had speculated, he gets sued.

If I may, Mr. President, I would like to put that in the context of the present budget debate because that is so much on everybody's mind. We are seeing estimates of the future that are coming out of the Office of Management and Budget. We are seeing estimates of the future that are coming out from the Congressional Budget Office. We are seeing estimates of the future that are coming out of the Mainstream Bipartisan Coalition, with whom I met yesterday, about what the economy is going to do and what the budget is going to do. Without the protection contained in this bill, if the Members of the Senate and the House, if, indeed, the President himself, were corporate executives making these estimates about the future, we would all be subject to class action lawsuits if it turned out we were wrong.

I guarantee you, Mr. President, we are all wrong. The only thing I know about the Congressional Budget Office projections for the future and the Office of Management and Budget projections for the future and the President's projections for the future and my projections for the future is that we will all be wrong. The future is not knowable with any degree of certainty. If it were, we would all be rich because we would all bet on the right side of every football game. We would all make the right choices for every stock that was purchased. We would all be rich because we could all predict the future with certainty.

None of us can, and yet that is the standard to which too many executives have been held in this arena: You said you were going to have product x ready for us by September and you missed it by 30 days. We are going to sue you for misleading us.

What protection does the executive have in that circumstance when they say, Mr. Executive, when do you expect to have product x ready for market? He says, I will not tell you because if I say September and it turns out to be October, you are going to sue me. And if I say September and it turns out to be August, you are going to sue me. So I will not tell you. Well, how can I make an intelligent guess as to whether or not I should invest in your company if you will not even tell me what you expect to happen? Tough luck.

That is what we have now, Mr. President. In the name of protecting the investor, we are depriving the investor of the very best guesses so labeled, estimates so labeled, conjectures so labeled, of the people who know the most about the company. We are asking the investor to fly even more blind than they would be if they had those guesses.

So let us understand as we debate this that we are talking about protecting people from lawsuits based on their inability to guess the future, not about protecting people from liars, cheats, and thieves. The liars, cheats, and thieves will still be subjected to class action lawsuits and the class action lawsuits will still end up recovering millions of dollars for investors. But if this legislation passes, honest executives who want to share their best guesses of the future with investors will be able to do so with the knowledge that if they happen to be wrong and product x comes out in October rather than September, they will not have to spend millions of the investors' money to pay off some professional plaintiff that has brought a suit against them on the technicality that exists in the present circumstance.

Mr. President, I see that my colleagues are now prepared. I am happy to yield the floor to those who have a differing point of view.

Mrs. BOXER addressed the Chair.

The PRESIDING OFFICER. The Senator from California.

Mrs. BOXER. Thank you very much, Mr. President.

I think we have an opportunity here to make a bill better, to fix some flaws in a bill that had the best of intentions when it started out, to make sure that we let people know if they are even thinking of filing fraudulent, frivolous lawsuits that they should not even think about it because they are not going to succeed in the end.

That is something I care a lot about. I represent a State that has a lot of businesses which have been hit by lawsuits that in many cases should not have been filed. On the other hand, many of them should have been filed.

My concern here is for small investors. I do not worry about the giant, wealthy investors who, frankly, can take a hit or two and not have any problem. I am worried about those people who save for their retirement, who are basically in the middle class of this country, who count on—the truth in deciding where to put their money so it is there for their retirement.

If they do get hit with one of these problems, it means big trouble. We saw it coming home to roost in the case of those who were defrauded by Charles Keating. We certainly do not want to pass a bill here—I do not think any of us would—that would make it easier for the Charles Keatings of the world to succeed in defrauding unsuspecting investors. Nobody wants that—nobody.

Yet, we know that as this bill has been analyzed by the experts, by the people in academia, by the people who know the law, by people who are really charged with protecting small investors, they are suggesting to us in very strong language that this is not a good bill.

The President heard those people, and I think it took some courage for him to veto this legislation. I think this override vote is going to be very, very close. I do not know where it is going to come out. But I hope, if Senators are making up their minds on this matter, that they would read the President's veto statement. I think it is very clear as to what problems he sees. I hope, also, they will read some of the many, many newspaper editorials that have appeared all across the country warning this Congress not to move forward with this bill.

Here is Money magazine. This is not a magazine of lawyers. As the Senator from New Mexico, Senator DOMENICI, said, ''Well, it is only the lawyers.'' This is Money magazine. It is very interested in this editorial in warning investors about this bill. ''Congress Aims at Lawyers and Ends Up Shooting Small Investors in the Back.'' I just think that sums it up.

We want to stop frivolous lawsuits. We want to stop anyone who would put a company through a lawsuit where there was no foundation for it. But we do not want to in the end shoot small investors in the back. They say:

At a time when massive securities fraud has become one of this country's growth industries, this law would cheat victims out of whatever chance they may have of getting their money back * * *. In the final analysis, this legislation * * * would actually be a grand slam for the sleaziest elements of the financial industry at the expense of ordinary investors.

Mr. President, that is strong language. What they are saying here is what I said when I began: we had a reason to take a look at all this. Our reason was frivolous lawsuits. And what we wound up doing is hurting small investors and creating a climate where the lowest of the low, the people who prey on others, who count on information to make investment decisions, are going to be rewarded by this bill. We do not want to do that, I believe.

I think what the President has done is to call our attention to the failings of this bill. I was a stockbroker many, many years ago. I was quite young at the time. But the one thing I understood was that people relied on me. It was a big responsibility. I often thought, you know, if you really did not have the best interests of the people in mind, you could get these people in an awful lot of trouble. You could churn their investments so that you would get a commission. You could hurt people.

It seems to me that type of person certainly is not the majority, but they do exist. As a matter of fact, if you look at current trends, unfortunately, there are more and more of these people than we would like to believe.

Here are some other newspapers. These are editors who have absolutely no stake in this from a financial point of view. As a matter of fact, most newspapers tend to be more conservative, more conservative, more probusiness than others. But look what they say.

''Protecting Investors From Securities Fraud.'' This is the Oakland Tribune.

Say you have a spare $1,000 or so, and don't want to salt it away in a simple savings account. You hear about a company's stock that is touted to go up because executives are forecasting greatly increased earnings. You decide to use your $1,000 to buy that company's stock based on the rosy predictions of future earnings, but the earnings forecasts turn out to be bogus. You learn the executives knew their earnings forecast was unattainable, yet they hyped their stock anyway. The stock price does not rise as the company's executives hinted it would, and your $1,000 is not worth $1,000 anymore, but less. And if you want to sue to recover your losses—

They point out—

you can now. But if a House-Senate conference bill passes—

And that is what is before us, Mr. President—he basically says:

it will be much more difficult to do so—

Meaning to sue. And they call on President Clinton to veto the measure—

because it leaves individual investors and an array of institutional investors, like pension funds, municipalities and other Government units without enough protection from manipulators like Charles Keating, Ivan Boesky and Michael Milken.

They go on to explain the bill. And they talk about how in fact these charlatans would really be popping their champagne in their boardrooms, in their homes tonight if we in fact do not sustain this veto.

Another editorial, the San Francisco Chronicle. The reason I think it is important, Mr. President, to read these is because, again, the way this bill is presented to us by the people who want to pass it is as if there were 90 lawyers in the entire country who really care about this, that they control this debate. Clearly, I am going to prove by the type and number of examples that I raise here that is not the case.

''Opening The Door To Fraud.'' And this says:

Legislation would wipe out important consumer protections. Securities fraud lawsuits—

This is in the San Francisco Chronicle—

Securities fraud lawsuits are the primary means for individuals, local governments and other investors to recover losses from investment fraud, whether that fraud is related to money, invested in stocks, bonds, mutual funds, individual retirement accounts, pensions or employee benefit plans. As the draft report stands—

That is essentially what is before us—

investors would be the losers, and their hopes of receiving convictions in suits similar to those against such well-known con men as Michael Milken and Ivan Boesky would be severely hampered. In the name of the little guy, Clinton should not let that happen.

Our President did not let that happen. Now there is a chance for us to stand up and be counted on behalf of the little guy, the little guy, the small investor, those of us in America—and that is most of us—who are really in the middle class, who would be greatly hurt if in fact we did not have the ability to go to court and to, if we were defrauded, have a chance at recovering even some of our investment.

This is a Michigan headline, and I think it is pretty strong. ''How Come GOP's 'Contract' Allows Ripoffs Of Investors?'' The reason they talk about it as the ''GOP contract''—and it is in many ways certainly supported on both sides of the aisle—is that the contract contains language that is in many ways the father of this bill. The Michigan paper says:

. . . let the bill's backers explain to the rest of us why stock swindlers need to be ''protected'' from lawsuits.

This is in the Muskegon Chronicle in Michigan.

The fact is we can stop this bill now. We can start all over again with a better bill. We can follow the advice of President Clinton. He has given us for the record, many, many letters from experts in this field who really convinced him that, in the end, this bill, as written, would hurt middle-class investors.

We have a road map from the President of some of the things that we can fix.

I would like to read a letter from the Fraternal Order of Police that I have to read before on this floor. It is a letter to the President:

On behalf of the National Fraternal Order of Police, I urge you to veto the ''Securities Litigation Reform Act.'' The single most significant result of this legislation would be to create a privileged class of criminals. . . our 270,000 members stand with you in your commitment to war on crime. I urge you to reject a bill which would make it less risky for white collar criminals to steal from police pension funds while the police are risking their lives against violent criminals.

I think this really says it all. Here is a letter written by police who are protecting our lives, they are on the line, and they are worried that their pensions will not be protected because this bill would make it possible for their pension plan to be raided and for them to lose their retirement funds.

Those who present this as an issue about special interests have a perfect right to do that, but I say to you, what we are doing goes quite beyond that. It termed called reform, but it overturns legal protections that have been there for investors since the thirties. How quickly we seem to forget history, that people, small investors deserve and need this protection.

We do not need to do this so much for those who are wealthy. They are not too worried about their being defrauded. But it is our small investors, it is our people, particularly the elderly, who count on getting their retirement from these investments, that we should be protecting. The wealthiest do not need us to worry about them and, frankly, the very poor simply do not have the funds to make these investments. So I think this is a vote on whether you are going to stand behind the middle class, the small investor, or are you going to abandon them in the name of frivolous lawsuits, which is a wonderful and noble objective which, frankly, has just gone awry.

The President vetoed this bill because I think he wants to stand with the middle class. He is certainly standing with them in this budget fight, and there is a connection. When you fight for the elderly to protect their Medicare, you are saying you care about these people. But at the same time, if you leave their pension plans open to raiding by people like Keating and Boesky, and we know the cast of characters we have seen come out of the eighties, then you are harming them. If you protect their Medicare on the one hand, but you leave their pension plans and retirement savings prey to those that, frankly, would take advantage of them only too quickly if they knew that the legal protections have been changed, you abandon them.

So I say the bill, as it is currently, is against the middle class. The bill targets small investors, the elderly and those saving for old age through their retirement.

Again, I do not think we can really bifurcate this argument from the rest of what we are trying to do. We stand here and we say we fight for the middle class. We are fighting against those Medicare cuts, those Medicaid cuts to our elderly in nursing homes and to make sure that kids have access to college loans so their middle-class families can afford to send them to college. Protecting them from securities fraud is part of standing up and fighting for people who count on us and who rely on us.

Many of us stand up here and say we are not going to see a budget go into effect that gives large tax cuts to the wealthiest among us while we hurt our middle class by cutting all these other programs. There is a nexus here. We should stand proudly for the small investor and those who need us.

The President's three objections, I think, are very clearly stated in his veto message. First of all, he talks about the bill's pleading standards which he believes would make it virtually impossible for those who have been defrauded to even bring a lawsuit in the first place. I think this is very important, because the bill, as it currently stands, requires defrauded investors to know the state of mind of the people who defrauded them before they even file a lawsuit.

How can you possibly know what is in the heads of people you have never even met? How can you prove what was in their minds before you have had a chance to find out what, in fact, they did have on their minds when defrauding you? You cannot. That is an impossible standard.

The President was willing to accept a bill which adopted the most difficult pleading standards adopted by any Federal Circuit Court of Appeals, and that is the second circuit. But what the President was not willing to do, was to make those standards even more difficult.

That is very important. The President is not saying in his veto message this is a terrible thing, we should not even be looking at this bill. He is saying there are things wrong with it. One of them is its pleading standards. In the President's own words,

> the bill would erect a barrier so high that even the most aggrieved investors with the most painful losses may get tossed out of court before they have a chance to prove their case.

The President was particularly concerned that the conference dropped an amendment overwhelmingly adopted by the U.S. Senate, an amendment offered by Senator SPECTER. I know Senator SPECTER was on the floor talking about his amendment. It would have remedied the problem that too draconian a pleading standard would have created. The SPECTER amendment would have allowed lawsuits to be filed if the defrauded investors could show that the defendant had the "motive and opportunity" to defraud them.

After that standard was met, the plaintiffs would be allowed to go forward and test whether the defendants actually defrauded them. But the operative language here, "motive and opportunity," would be the standard, instead of the impossible standard where you have to describe the mind of people you do not even know who have defrauded you, proving what was their state of mind before you can even get into the courthouse.

That is not what American justice is all about. We are proud of our legal system because its doors are open. They are open to the wealthiest. They are open to the poorest. This really would slam that door on the small investor. That is wrong.

The President also opposes the bill's draconian safe harbor which permits outright frauds as long as they are couched as predictions and estimates of future profits and income. The President is saying, if you allow companies who do not tell the truth to cover over outright lies using "predictions" and "estimates," then you are not giving these companies a safe harbor, but rather, what has been described on this floor, as a "pirate's cove" filled with sharks and barracudas. You are going to have sharks and barracudas hiding in the safe harbor, calling something a prediction and the investor, who is not sophisticated making an investment based on this very misleading language.

Fraudulent future predictions and estimates would be permitted under this bill if those defrauding attach "some" possible reasons why the prediction might not come true. Those defrauding can hide the real reason that their fraudulent prediction will not come true and they cannot be sued.

In other words, they know that what they are saying to unsuspecting investors is not true, but they couch it in terms such as "this is a prediction," "this is an estimate." Then they are home free protected by the "safe harbor" from successful suit.

The President has been reasonable. He is willing to allow greater protections for predictions and estimates of a company's prospects, but he is not willing to permit outright fraud.

I think the President is being extremely reasonable when he says bill needs to be changed. The safe harbor is the one change and the pleading requirements are the other.

The President is also opposed to the bill's unfairly treating plaintiffs more harshly than defendants. That moves us toward a loser-pay standard which we all say we do not think is a good thing but, frankly, it is in this bill.

The bill creates a presumption that small investors must pay all of the other side's legal fees if their initial fraud complaint violates rule 11 of the Federal Rules of Civil Procedure, but it does not require defendants who violate that same rule in similar situations to pay all of the plaintiff's legal fees. So what kind of justice is that? That is so blatantly unfair, I do not even know how to express my outrage at that particular provision.

I do not happen to believe in loser-pays for either side. I just think that is a way to basically send a message to people that they could get stuck—mightily stuck—with large bills. They could be small investors or, frankly, small companies. I think that is totally wrong. The fact is, we have a legal system that has worked pretty well, and I am very fearful that if we start introducing a modified version of loser-pays in this bill, there is no stopping it. I think that would be a very dangerous thing to do.

If you are a very small investor and you think you have a really good case, but you know if you have an unfriendly judge, for example, you could get stuck paying the other side's legal fees, you might walk away and allow a real swindler to get off the hook. So this troubles the President, as well it should, and it troubles me, as well.

We believe, really, that small investors would be terrorized into not filing lawsuits for fear of having to pay these legal fees of large well-heeled corporate defendants who could run up very large legal bills. So for at least 100 years, the American court system has rejected loser-pays because it prevents aggrieved parties from asserting their rights.

I have already put into the RECORD today a number of newspaper articles. But I have to say, Mr. President, again, to those who try to dismiss the opposition of this bill, they are really not being fair. It is true that everybody wants to stop frivolous lawsuits. So it was hard for many of us to stand up and oppose this bill. But I have to tell you, if you listen to some of the groups in the country who oppose this bill, I think it would be an impressive list:

The Government Finance Officers Association [GFOA], a professional association of State and local government officials, both elected and appointed, whose duties include the investment of cash balances and pension funds and issuance of municipal debt. These are the people who know what is at stake here. The Government Finance Officers Association opposes this bill.

The U.S. Conference of Mayors opposes this bill. Why? Because they have large security investments, including pension funds. For example, the city of San Jose in California was completely ripped off by an unscrupulous broker many years ago. They were able to recover because we had good laws on the books—laws that are going to be changed, and their city attorney came before our committee to testify and said it would be very dangerous to change these laws.

Then there is the North American Securities Administrators Association, who represents the 50 States' securities regulators, responsible for investor protection, and the efficient functioning of the capital market at the grassroots level. The North American Securities Administrators Association opposes this.

I have a letter from the California County Officials. They oppose this.

The American Bar Association.

I just, Mr. President, fear very much that we will be back on this floor if we cannot work this into a better bill, when the first scandal hits, with Senators saying, ''My God, I never knew, we did not mean it, and we have to take another look at this.'' You know that is going to happen.

I think we should listen to the people in the local counties across our country. I think it is pretty effective. We have a letter signed by 99 California government officials, including the mayors of San Francisco, San Jose, and officials in 43 of our State's 58 counties. Mr. President, I want to say that many of these counties who signed this letter are extremely conservative local government officials. It is rare that they call me and are so united on such an issue.

I have, also, a letter signed by 34 county treasurers in Arkansas, 51 public officials in Georgia, 58 public officials in Massachusetts, including the Massachusetts Association of County Commissioners. I have a letter signed by 39 officials in New Jersey, including the New Jersey Conference of Mayors and the New Jersey State League of Municipalities.

So it is very important. In this letter signed by California county officials that I talked about, they say:

> In recent years, local California governments, most notably Orange County, have lost more than $2 billion in the securities markets, partly due to derivative investments. Some of these governments have pending securities fraud cases; others are still deciding whether to use the courts to pursue recovery of losses.
>
> Now is not the time to weaken defrauded investors' rights to pursue civil action, as would occur—

Under the bill that is pending before us—

> unless institutional investors that are defrauded have the ability to recover their losses in court, they will have to make the unenviable choice [as Orange County did] between cutting essential services, such as education programs, or raising taxes.
>
> We urge you to do the right thing and protect taxpayers' investments from securities fraud and oppose this unbalanced, unnecessary and dangerous legislation.

Again, this is from Fresno to Los Angeles to Riverside and Stanislaus County, Kings County, Tulare County, Yuba, Shasta, Monterey, Siskiyou, Sierra. I am talking about counties from the city to the rural areas—everywhere. Inyo, Mariposa, Santa Ana, Fremont, Stockton, Riverside, Oceanside, Elmonte, Thousand Oaks, Westminster, Newport Beach, Arcadia, Barstow, Contra Costa Water District, South Pasadena, South Tahoe Public Utility District, city of Hemet, San Benito County, and others. My State has 31 million people in it—31 million people in it, Mr. President. Every time we do something here, it affects my State more than any other State just by virtue of that fact. To have these Republican and Democratic elected officials be so united in their opposition is very, very unusual. Retirement associations all throughout the State, including my home county of Marin, where I served on the county board of supervisors—they are very conservative—they do not want to see us weaken these laws.

The American Bar Association, their new president, Roberta Ramo, has written an excellent letter to the President outlining their problems with this bill.

I want to conclude my remarks, Mr. President, by saying this: Again, my State represents a lot of the companies that have legitimate problems with frivolous lawsuits. I promised those companies I would do everything I can to work on legislation that really addressed their problems. I do not want to see anything hurt decent business people. On the other hand, I want a balanced bill and one that does not go so far that the charlatans that may be stockbrokers, investment advisers, corporations—we have seen them so much in the 1980's, and we see more now—we do not want to open the door to that kind of investor fraud.

I think the President took a strong stand to protect the middle-class investors. I applaud him. I hope we can in fact sustain that veto. I know if we do, it will be very close one way or the other, if we fail or if we succeed. But I have to say this: What is at stake here is really, I think, in the long run, the health of the securities markets. The worst thing we can do is have a situation where the laws on our books have been weakened to a point where they do not provide investor confidence. People will not invest their money, and we will have a situation where decent companies are going to have to pay a premium—it is really a premium—in order to convince people to invest with them. That will cost these good companies more money. They will have to pay more interest to these investors because many investors, as soon as we have that first scandal, are going to say, ''You know what? Maybe I am better off with Government bonds. Maybe I am just better off getting a certificate of deposit that is insured by the Federal Government.''

So that would be the worst thing that could happen, in the long run—if we try to address one problem, frivolous lawsuits, and weaken our laws to such a point that people do not have confidence to invest their money in the market.

So I hope we will stand with the President. He has really laid out a clear path on how to fix this bill. I want to thank Senator BRYAN and Senator SARBANES.

I have been proud to be on their time as we have tried to bring these issues to the President's attention, to our colleague's attention and frankly to the attention of the American people. I hope we will sustain this veto. I yield the floor.

(Mr. CAMPBELL assumed the chair.)

Mr. GRAMS. As a conferee for this bill, I am here on the floor today to also join those others in urging my colleagues to vote to override the President's—what I consider—ill-advised veto of the conference report on securities litigation reform.

Back on December 5, 65 of us voted in favor of the conference report that the President has now vetoed. Mr. President, 69 of us voted for S. 240, which was substantially similar to the conference report.

Now, the principal authors of this legislation are Senators D'AMATO, Senator DODD, and Senator DOMENICI. These Senators put aside their political and partisan differences to do something right for small investors, for workers and for the consumer. All of us did. When you have legislation that is authored and supported by the general chairman of the Democratic National Committee and the chairman of the Republican Senatorial Committee, I believe that is what you would call compromise. When you have almost 70 Senators from both sides of the aisle voting for this legislation, that is also called compromise. So, why did the President veto this measure?

Well, in his letter accompanying the veto, the President said that he wants to protect innocent investors from being defrauded. Well, this legislation protects those investors. It preserves the right of these investors who are truly victimized by securities fraud, but it does much more than that, as well. It also will protect the worker who is out there and worried about being laid off because his employer had to pay attorney's fees instead of being able to pay his salary.

It will help the consumer who has to pay higher prices for products today because of the hidden costs of frivolous legislation and litigation.

It will pay off for the legitimate investors and for the pensioners whose life savings are being jeopardized by strike-suit attorneys.

Finally, it will also benefit the thousands of honest, hard-working attorneys who have watched the public image of their profession being tarnished by a few greedy quick change artists.

It is also for the sake of those Americans that we have put in long hours of hard work to craft what I believe is a very balanced and reasonable bill.

The only people who will lose under this legislation are the small class of attorneys who have used professional plaintiffs to file frivolous and meritless suits, again just to make a quick dollar. They use joint and several liability to bring secondary defendants into their cases simply to try and extort a higher settlement out of them as well.

Now, the social costs of these suits are very, very high. Again, they would result in fewer jobs because employers would be paying high costs for frivolous litigation, rather than being able to put that money where it would make a difference, and that is in the higher salaries or more jobs. Higher prices for the consumers who end up having to pay these costs because they are passed along in the cost of doing business. They go into the products and the services that these people provide, so consumers end up paying more because, again, of the costs—the hidden costs—of frivolous litigation, and it has diminished returns for the innocent investors. The very investors that the President says he wants to help protect are the ones who would benefit from this bill, as well.

What do investors get in return for those abusive lawsuits? In the past they have received about 6 cents on the dollar that has gone back to the victims. The rest has gone into litigation, legal expenses and lawyer's fees. Who is the President really trying to protect? Investors, the consumers, or the workers, or a small group of unethical lawyers? I think that answer was obvious.

Legislation is not meant to protect political constituencies. When we do the work of the people we should think of what the voters called for in the last election—not the commercials that consultants will be running in the next election. That is not what the President did when he vetoed this bill. We should not stand for it as well.

For those reasons and for the sake of the small investors and the consumers, the job creators and the workers, we should override this veto, because if the White House will not stand up for these individuals, who will? We must. I believe that we will.

Again, I urge my colleagues to override the veto and to enact the commonsense legal reform that is contained in this bill. I yield the floor.

The PRESIDING OFFICER. The Senator from Utah [Mr. HATCH] is recognized.

Mr. HATCH. I thank the Chair.

Mr. President, on December 19, 1995, President Clinton vetoed the conference report to H.R. 1058, the Securities Litigation Reform Act of 1995. This act represents a very modest step forward in addressing some of the egregious abuses present in our litigation system today. In doing so, I believe President Clinton has sided with a handful of very wealthy lawyers and against the interests of the American people at large. President Clinton is a tenacious defender of the status quo. I do not think the status quo is serving us well.

The securities bill was developed over the past several Congresses by a dedicated, bipartisan, moderate group of reformers who have long seen the need to change our securities litigation system. Senators CHRISTOPHER DODD and PETE DOMENICI have led this effort for a number of years and finally saw the opportunity for meaningful reform in this Congress.

The securities litigation conference report passed the Senate by a bipartisan vote of 65 to 30. A total of 19 of our colleagues on the other side of the aisle voted in support of this moderate and meaningful bill.

The legislation sought to make securities litigation fairer by curbing the abusive litigation practices that have been employed by a small number of plaintiffs lawyers in securities litigation class action lawsuits. That very small group of trial lawyers who specialize in securities litigation lawsuits represents the only ones who are truly hurt by the securities litigation reform bill. Likewise, they are the only ones who are helped by the President's veto—just a few, very wealthy litigation lawyers in the field of securities law.

The plaintiffs lawyers who benefit from the President's veto are the ones who perfected the so-called strike suits. Strike suits are filed against companies after a drop in the stock price, frequently without regard to whether there has been any fraud or wrongdoing on the part of the company. And by the time the suit really gets in full swing, the litigation is so expensive for the companies that many of these companies just settle for defense costs to get rid of the problem and the embarrassment, and to not have to take a chance with some of the juries in some of the more, shall we say, jury-liberal States in our country.

For example, in 1990, when LA Gear, the sportswear and sneaker manufacturer, announced lower than expected earnings, one law firm filed 15 lawsuits just 3 days after the announcement.

The Banking Committee heard testimony concerning other cases in which securities lawsuits were filed within 90 minutes of the drop in share prices. These kinds of filings without regard to the merits are ridiculous. They are hurting American businesses and consumers.

I am particularly concerned because perhaps hardest hit have been high-technology companies. Those companies form a key part of the American economy and are vitally important to the economies of Utah and many other States. They are being disproportionately hurt by these lawsuits.

A Stanford University law professor, conducting a study of securities class action lawsuits filed in the 1980's, most involving high-technology firms, found that every single company, every single high-technology firm that experienced a market loss in stock price of at least $20 million was sued. Every single company. Those kinds of abuses are an outrage and an affront to the legal system. These are some of the most successful American companies, and they are being besieged with lawsuits. Some think it should be called legal extortion. It simply cannot be that every single high-technology firm that has suffered a $20 million or more loss is engaged in securities fraud. It just is not true. But by the time the lawsuits start and the litigation begins, and the depositions start and the discovery becomes burdensome and onerous, a lot of companies just throw up their hands in the air and pay whatever they have to to get out of it because they know that kind of litigation is never ending.

The current litigation system encourages wasteful and needless litigation even where there is absolutely no evidence of wrongdoing. The unavoidable fact is that because of current skewed incentives in the litigation system, the small group of lawyers who file most strike suits are not filing such suits to protect shareholders against corporate fraud and wrongdoing. They are doing so to line their own pockets.

I happen to be a lawyer. I happen to understand securities law. And I can tell you that is what is happening. The Banking Committee heard testimony that plaintiffs in these suits typically receive only 14 cents for every dollar while the trial lawyers collect a whopping 39 percent of these settlements. That is abominable and everybody knows it. Other studies have suggested even lower plaintiff recoveries. We are talking about the people who are supposedly wronged getting 14 cents out of every dollar while the attorneys get 39 cents out of every dollar.

These lawyers are filing these lawsuits so that they can terrorize American companies into paying exorbitant settlements because they know these companies cannot afford the high legal fees that would be required to defend themselves even against meritless lawsuits.

When companies must pay for needless litigation, settlement and insurance costs with dollars that could be going to create jobs or to further research and development, consumers and stockholders, virtually all Americans in fact are hurt. Due to wasted resources, profits and stock prices are lower than they would otherwise be and the shareholders in the end lose out. That should not be lost in this debate.

The truth is that shareholders are very well protected under the securities laws and under this securities bill. This legislation ensures that the class action device remains available for those shareholders who have been in fact victims of securities fraud. In fact, it improves that device so that injured investors, not a small group of greedy lawyers, can control the litigation.

Although the President pointed to what he claimed are a number of shortcomings in the bill that justify his veto, his excuses are just that—slender excuses for siding with some of these jackal lawyers.

First, the President nitpicked with the bill's pleading requirements. However, legislative history in the House and Senate makes clear why a heightened standard requiring pleading with particularity is necessary to eliminate securities lawsuit abuses. The conference report sensibly requires a heightened pleading standard to weed out frivolous litigation and to free parties against whom claims are made from being subject to abusive and expensive discovery.

Second, the President went after the safe harbor provision, which creates a safe harbor for forward-looking, predictive statements. Some companies have faced damaging lawsuits merely on the basis of vague but optimistic projections that the company would do well even though it was clear that the prediction was speculative and future oriented. The safe harbor provision sensibly addresses those problems.

In fact, President Clinton notes that he supports the conference report language but is concerned with some language in the statement of the managers of the bill on this provision. Now, the Constitution gives the President the authority to veto legislation, but nowhere does it give the President authority to veto legislative history. I think a veto on the grounds of legislative history in this case is extreme, especially in light of the clear language of the bill.

In short, President Clinton was stretching for excuses to veto this legislation. The only thing President Clinton has shown with his veto of the securities litigation reform bill is that he will side with a handful of trial lawyers against the interests of all Americans—especially American consumers and shareholders. He has proven that he is not an agent of meaningful and needed change but instead a tenacious defender of the status quo.

I encourage my colleagues to override his veto so we can provide meaningful change to Americans who are fed up with lawsuit abuse in this country. My good friend and colleague from Pennsylvania has joined the Clinton administration in questioning the pleadings standards contained in this bill. I should note, for the record, that in June of this year this very administration that has vetoed this bill called the bill's pleadings standards ''sensible'' or ''workable.'' I would also note that these pleadings standards were based, in part, on the recommendations of Judge Anthony Scirica of the Third Circuit Court of Appeals.

Mr. President, I ask that the June administration policy statement and an October 31 letter from Judge Scirica be printed in the RECORD.

There being no objection, the material was ordered to be printed in the RECORD, as follows:

STATEMENT OF ADMINISTRATION POLICY

The Administration supports appropriate reforms of the federal securities laws. The goal should be to and litigation abuses and to clarify the law, without improperly limiting the rights of investors to pursue civil actions against financial fraud.

As reported by the Senate Banking Committee, S. 240 contains a number of provisions designed to end litigation abuses which the Administration endorses. A number of its original provisions that had been the focus of committee discussions have been modified appropriately or deleted. S. 240 is now a substantial improvement on H.R. 1058, which the Administration could not support. For instance, S. 240 rejects certain of H.R. 1058's egregious provisions, such as its ''loser-pays'' approach and its too-stringent definition of recklessness. At the same time, S. 240 adopts several sensible provisions, including a workable pleading standard taken from the Second Circuit, and appropriate class action reform provisions.

The Administration recommends the following modifications to two provisions in the bill:

Safe Harbor—The Administration supports the Committee's attempt to craft a statutory safe harbor that would encourage the dissemination of forward—looking statements without protecting statements made with an intent to mislead. The Administration does not believe a safe harbor should protect statements known to be materially false or misleading when made. The Senate should clarify whether the safe harbor's current language would protect such statements.

Proportionate Liability—The Administration opposes the bill's provision that would establish proportionate liability for reckless defendants because in cases involving insolvent defendants, the provision would leave investors unable to recover their full damages. Culpable solvent defendants, rather than defrauded investor, should at least bear a substantial portion of this noncollection risk. Accordingly, the Administration supports an amendment that would require culpable solvent defendants to pay up to twice their proportionate share of damages (rather than 150 percent as in the Committee bill), when other defendants have gone bankrupt or fled.

The Administration recommends that the Senate adopt the following measures, which are not included in S. 240:

Private Aiding-and Abetting—The Committee bill explicitly retains the SEC's authority to take action against those who knowingly aid and abet securities fraud. Congress should also restore this action for the SEC against reckless aiders and abetters, as well as for private actions that follow a successful SEC action.

Status of Limitations—The Administration recommends extending the statute of limitations for private securities fraud actions to five years after a violation occurs. Although S. 240 as originally introduced addressed this issue, the Committee deleted it from the bill.

It should be noted that the Securities and Exchange Commission has expressed many of the same concerns with respect to this legislation. The Administration encourages the Senate to continue to work with the Securities and Exchange Commission to ensure that S. 240 redresses litigation abuses while preserving the ability of investors to bring class-action lawsuits against financial fraud, a legal device that is critical to the maintenance and integrity of our financial markets.

Pay-As-You-Go Scoring.

S. 240 could affect receipts; therefore, it is subject to the pay-as-you-go (PAYGO) requirement of the Omnibus Budget Reconciliation Act of 1990. The preliminary OMB PAYGO estimate is zero. Final scoring of this legislation may deviate from this estimate.

UNITED STATES COURT OF APPEALS,
Philadelphia, PA, October 31, 1995.

Ms. LAURA UNGER,
Mr. ROBERT GIUFFRA,
Senate Committee on Banking, Housing and Urban Affairs, Dirksen Senate Office Building, Washington, DC.

DEAR LAURA AND BOB: I have a few suggstions for your consideration on the Rule 11 issue.

Page 24, line 11: Insert ''complaint'' before ''responsive pleading.''

Page 24, line 19: Insert ''substantial'' before ''failure.''

''Complaint'' would be added to item (i), so there is a clear provision that reaches any failure of the complaint to comply with Rule 11. A small offense would be met by mandatory attorney fees and expenses caused by the offense; if item (ii) is modified without this change, a gap is left in the statutory scheme. The result still is a big change from present Rule 11, which restricts an award of attorney fees to a sanction ''imposed on motion and warranted for effective deterrence.'' A serious offense—filing an unfounded action—would be reached under item (ii).

I also wish to confirm our prior conversation on scienter and the pleading requirement.

Page 31, line 5: Delete ''set forth all information and insert in its place ''state with particularity.''

Page 31, line 12: Delete ''Specifically allege'' and insert in its place ''state with particularity.''

As I indicated, this would conform with the existing language in Rule 9(b) which provides that ''the circumstances constituting fraud or mistake shall be stated with particularity.''

Also, page 24, line 1: Delete ''entering'' and substitute ''making.''

Page 24, line 4: Delete ''of its finding.''

Many thanks.

Sincerely,

ANTHONY J. SCIRICA.

Mr. HATCH. Mr. President, this is an important bill. It is true reform. Having read and studied securities litigation, under the securities law true fraud can be prosecuted, true fraud can be brought.

This bill is not going to interfere with those cases. What it does is stop the abuse and misuse of the class action litigation and even things out. This will stop the abuse of companies that have a downturn in their stocks, which happens to a lot of companies, and perhaps through no fault of their own or through some economic downturn that affects them, and will stop the litigation that is brought in many cases just to get defense costs. Too often, it costs more for companies to defend themselves, even though the case is meritless, than it would just to settle the case and get rid of the nasty hornet that has been buzzing around the company's head, for the use of these sometimes very greedy lawyers.

Not all lawyers are greedy; not all lawyers are bad. Most of them are very good people. But there are abuses in the law. In this area it is particularly pronounced. This bill is brought to try and correct some of those pronounced abuses.

Mr. BRYAN. Mr. President, I am looking around the gallery today, as citizens visit our Nation's Capitol, and those that are tuned in on television across the country are saying to themselves, ''I do not understand what this debate is all about. Are there not bigger problems that the Nation faces?''

Clearly, we are in a state of paralysis here in Washington today. Part of the Federal Government is shut down. There is no clear path, as I speak at near 2 o'clock in the afternoon, eastern standard time, as to how we are going to break this gridlock or logjam that has gripped us in this confrontation as to how we balance the budget in 7 years, and the road we use to get it. That is a major issue. No question about that.

Let me try to put this debate into some context because I acknowledge that the country's attention is focused on the macroeconomic picture, the kind of thing that will affect the future of our country and of our Nation.

What is at stake here? Is this an argument between a handful of greedy lawyers, as the proponents of this legislation argue, in disagreement with a small group of people on Wall Street—brokers, accountants, entrepreneurs—who wish to access the capital markets of our country and issue stock? Is that what this thing is all about? I say to our visitors and Americans across the country, this is a far, far bigger issue.

I acknowledge that it is terribly esoteric, arcane, highly technical. Why should somebody listening in on this debate have an interest or concern in the outcome? Anyone who has a single share of stock in any publicly traded corporation has an interest in the outcome of this legislation because that individual, he or she, could become a victim of a fraudulent action. The ability of that individual to recover as a consequence of that fraud is, in my judgment and those of us who have fought this legislation, severely limited and compromised. That is tens of millions of people. In addition, there are probably tens of millions of people more who do not own a direct interest and say, ''Look, I have never invested in the stock market. I have no money. My wife and I and my family are lucky if we have a few dollars in the local credit union or the bank. I don't deal with these Wall Street issues. What do I have at stake in this debate? You lawyer types and Senators have sure lost me in this debate. I do not understand what I have involved.''

The answer, that there are tens of millions of people out there in this country, good people who have worked all of their lives, who have retirement funds—their security, their safety blanket—these people have tens and tens of millions of shares invested across America in retirement funds. Those retirement funds could be victimized by fraudulent actions, and as a consequence of that fraud, those retirement funds can be severely impaired financially, devastated, and depending upon the magnitude of the fraud could, conceivably, be wiped out.

What does the average American have that interests him in this piece of legislation? His or her retirement could be at risk if they are not able to adequately recover against those malefactors, those that have been involved in perpetrating a fraud. So those who have money in a retirement out there, whether a company-sponsored family or one of the many variations of a 401(k), you have an interest in this debate and your children have an interest in this debate, because some of you are hoping that you have a little money put away, and maybe their inheritance can be affected, as well.

Broadly stated, 260 million Americans have an interest in the outcome of this debate because we are all taxpayers, every single one of us, directly or indirectly. That is why such widely divergent groups such as State financial officials, State treasurers, State controllers, State financial officers—Democrat and Republican, East and West, big cities and small towns—have expressed their opposition and concern; because they know that their community, their village, their town, investing money on behalf of the taxpayers in a securities portfolio, that they can be victimized as well. They do not want to jeopardize their ability to recover on behalf of the taxpayers of their town or their community or village. That is why they have joined in opposition.

I do not doubt relatively few if any are lawyers or stockbrokers or involved as entrepreneurs. So it is their interest on behalf of each of us as American citizens that has dictated that they write us to inform us they are gravely concerned and strongly oppose this bill. I will go into some of the reasons in a moment.

University and college officials who are involved in the management of investment portfolios of American colleges and universities—whether they be private universities, private colleges, or the great State-supported institutions in our country—they, too, have called and written. They strongly oppose this legislation because they know that the investment portfolio upon which their college or university depends can be impaired and financially wiped out if investor fraud occurs and they are unable to recover on behalf of those funds the losses sustained as a result of that fraud.

So we are here today, not talking about 90 greedy lawyers or the entrepreneurs. I think all of us in this country, irrespective of our political leaning or philosophical inclination, are highly supportive of the entrepreneurs in America. They do provide the mainstream for our free enterprise system. But this issue is much broader than that debate. Every citizen in America has an interest in the outcome of what we do.

It has been said that only the dead have seen the last of war. Tragically, I suspect that is true, as much as we would hope that is not the case. Let me just say that only the dead have seen the last of investor fraud in America. The Wall Street Journal, in a fairly recent publication, has told us that investor fraud has increased. In another article we are told that, notwithstanding the efforts of the Securities and Exchange Commission—no partisan commentary is intended—that indeed they have fallen behind. Maybe to some extent we are losing that fight, in terms of pursuing with the kind of diligence that every American would want us to pursue those individuals who practice fraud in the securities markets and who rip us off. So why are we here talking about this thing less than a week before Christmas? It is because every American is affected.

Let me try to say a few words about our system, the system we have created, Democrats and Republicans alike, over a period of some six decades and a little more now, to protect investors, to protect them against fraud. To those people out there who are motivated by greed, who cut corners a little tightly and whose primary interest is to line their own pockets and who care not a whit about whom they hurt—there are still those people out there in America. Unfortunately, they are still involved in investor securities activities.

We set up, over the years, a system that depends upon three pillars to protect the consumer, the investor, the American taxpayer in this broad sense. One, we have empowered the Securities and Exchange Commission. It is a Federal agency. They are out there monitoring the market, responding to complaints. That has been true under Republican and Democratic administrations alike. The agency traces its origin back into the aftermath of the collapse in the Great Depression in the 1930's. And they are out there. By and large they do a good job. Sure, some of us may have some criticism of this or that. Criticism can be found with each of us. But they are out there doing a good job.

But the system does not depend, in terms of the enforcement and the policing of the markets, solely upon the Securities and Exchange Commission.

Its premise and predicate contemplates that there are two additional pillars upon which investor protection is predicated.

Another one of those is what we have done at the State level. If I might say for a moment, as my colleagues know, I have had some experience in the State level serving as the chief executive of my State. They are banded together in a group called the North American Association of Securities Administrators. Their job is to try to protect their citizens in each of the 50 States against the kinds of frauds that occur in our society with respect to the issuance of securities. By and large, I think they do a good job as well. They are not lawyers per se; accountants, per se. They are individuals appointed, by and large, by the respective Governors of their States to help to protect citizens of those States against the kind of securities fraud that occurs. So they, too, have written us in the strongest, most urgent, compelling language to say in our considered judgment this would limit the ability to protect the citizens of our State. We do not speak as lawyers. We do not speak as accountants. We speak as one who, like yourself, is impressed with the public trust to protect the citizens of our State. That is the way our system works.

Finally, the system, contemplated and acknowledged by all, that notwithstanding the fact that we have people at the Federal level and at the State level who are part of our system of Federal and State government who are charged with protecting the consumer, particularly as it relates to investor fraud in the securities market—it is contemplated that the private investor, through his or her ability to file class actions in the Federal court system of America, is a very important adjunct to this system. It is absolutely indispensable; absolutely indispensable. Those statements can be heard from Republicans who have Chaired the Securities and Exchange Commission, by Democrats, and by all commentators, that the private sector is critically important in terms of monitoring the market and in terms of recovering for investors who are defrauded as a result of security fraud.

In point of fact, that is going to be even more important. Whether one characterizes himself or herself as liberal or conservative or middle of the road, everyone in this Chamber, and I think most people in America, would acknowledge today that our budgets over the next few years are going to be tighter and tighter and tighter. And that means, no matter how much we would like to allocate to certain programs, there is going to be less money. So the notion that somehow we are going to be able to provide the Securities and Exchange Commission with more money to monitor and enforce in the marketplace so that there needs to be less reliance upon the private sector and its ability, through class actions, to bring lawsuits, is simply misplaced.

Nobody in this Chamber and nobody in the other body believes for one moment that we are going to have those kind of resources, wish as we may. The budgets are going to be tighter next year and the year thereafter and the year after that. I say that, Mr. President, as one who recognizes that, who supports the need for that, who is one Democrat who believes that a constitutional amendment to require a balanced budget is a necessary and desirable objective. And I recognize that there are going to be some constraints. So there is going to be less money available.

This legislation delivers a series of crippling blows to the small investor to recover through the process of a class action securities case. Having said that, is there no problem out there? Is nothing wrong? The answer to both of those questions is yes, there is a problem out there, yes, there are some things that need corrections. I acknowledge that. The focus ought to be the frivolous lawsuit.

I am a lawyer. I am proud to be a lawyer. I was never involved in this type of work at all, have never represented plaintiffs in class actions, mercifully have never been sued as part of a class action, and have never defended anybody. But there are lawyers out there who abuse the process, and who abuse the courts, and I have absolutely no sympathy at all for those kind of lawyers. As I have said previously on the floor, let Heaven and Earth and the wrath of God Almighty fall upon those lawyers who abuse the system, and there are some.

So the focus, it seems to me, ought to be to deal with the frivolous lawsuits and to deal with some of the problems that exist in our present regulatory structure. Let me tell you, there are some things that we can agree upon and that I think are good in this legislation, things that I have agreed to support, and indeed things that I have sponsored in other pieces of legislation and which my distinguished colleague from California, who spoke so eloquently a moment ago, would agree on. So there is some consensus. Let me talk about those for a moment because I am not opposed to legislation to correct the problems in the market. I support that enthusiastically.

There has been a practice that has grown up that ought to be eliminated. That is the payment of referral fees to brokers. We ought not to give incentives to brokers to refer potential security fraud to class action lawyers.

So this legislation, my friends, prohibits the payment of referral fees to brokers. That is a good and desirable reform. I am for that. There has been a practice that has grown up that sometimes in class actions certainly plaintiffs' lawyers are given bonus payments. That, too, is a practice which is wrong, and we ought to eliminate the so-called ''bounty'' payments or bonuses.

This legislation limits the class representative's recovery to his or to her pro rata share of the settlement for final judgment, no bonus payments, and I agree with that. That has been an abuse that we need to correct. And there are occasions in which lawyers are involved in a conflict of interest. This Senator has no sympathy for those lawyers, and we ought to eliminate that practice very wisely, and correctly. This legislation does so. I agree and wholeheartedly support that provision.

We need to make sure that, before any settlement is effected, that the person for whose benefit the lawsuit was commenced in the first instance—that is, the investors themselves in the class who have lost money—ought to be adequately informed as to the proposed settlement and what it means for them. That is reasonable, is proper, and we ought to make sure that is done.

This legislation improves the information requirements to make sure that meaningful information about the terms of the proposed settlement are included, that it would also include the average amount of damages per share that would be recoverable—and the settlement parties can agree on the proposed figure—and it also must explain the attorney fees and costs.

Let me emphasize that point again. The lawyers have to be up front, and their clients ought to know what they are getting out of any recovery. I agree and support that as well.

Finally, there is the provision which empowers the court to monitor and to limit attorney fees to make sure that no small investor is gouged as a consequence of lawyer fees. We agree with this. Let me go a little bit further.

I have sponsored a piece of legislation called the Frivolous Lawsuit Prevention Act in which I believe that the provisions of rule 11—that is one of the Rules of Civil Procedure—which, in effect, requires a lawyer who files a lawsuit to, in effect, show that it is a meritorious lawsuit, not that the lawsuit will in fact be won. There are few certainties in life, and certainly filing lawsuits and being certain that you are going to win is not one of them. I tried a number of lawsuits in my time, not in this field. I have won cases that I thought I had very little chance of winning, and I have lost cases that I thought were about as certain as could be possible.

So the standard is not whether you are going to win, but is it meritorious? There are some lawyers who file frivolous lawsuits. My friends who support this legislation and I would agree, as I have said previously, about strong sanctions. I favor enhanced sanctions through the rule 11 mechanism that would require a judge who finds that there has been frivolous conduct on the part of an attorney to impose sanctions, costs and fees. But let me say that not only plaintiffs' lawyers abuse the process in the system. Defense lawyers do as well. Those sanctions in the provisions that attach ought to apply equally to both sides.

It is some indication of the bias of this legislation that the sanctions that we provide for, the enhanced sanctions, essentially apply in a very disparate way only with respect to the lawyers who represent the plaintiffs. Those lawyers should in fact be subject to the sanctions. But their counterparts who are involved in defending actions, if there are frivolous actions undertaken by the defendants' lawyers, those lawyers ought to be subject to similar sanctions. There is an old expression, ''What is sauce for the goose is sauce for the gander.'' I do not think you have to be a Harvard law graduate to understand the fairness and the soundness of that policy. Unfortunately, this legislation does not do that.

What has happened as this legislation has been developed is something that is characteristic of what has happened in this Congress. Most of the legislation that has been introduced—not all, but most of it—is designed to deal with the problem in which in a very broad and generic sense there is some legitimacy. Yes, there is a problem there that requires action. But if this Congress is noted for anything, it is noted for its propensity to overreach. Yes, there is a problem. But rather than just addressing the problem, what occurs is that the gates are opened up, and those folks who, again, are motivated by greed see an opportunity to make them immune from liability, fail to address the statute of limitations which has nothing to do with the merits of the lawsuit, but just when can an injured or defrauded party be able to file the lawsuit under the law. And this is a classic case of overreaching, and it is, in my view, an extravagance.

It is also, it seems to me, litigation that takes flight and lift only because of some of the myths that are repeatedly mentioned in this Chamber. Myth No. 1, securities class action suits are exploding in number.

Mr. President, as I indicated earlier in my comments, this legislation derives much of its support from anecdotal evidence, information, and from what I call a number of myths that have circulated through the Chamber and around the country that have taken on a life of their own and have assumed the stature of uncontradicted fact. I want to take some of these myths for a moment and discuss them.

We are told that we need this legislation with all of the overbreadth, in my view, that is contained in it because there is a securities class action lawsuit explosion crisis in America, that the courts are literally being overwhelmed by these actions that have been filed, and, therefore, the Congress must take action to address that situation.

I want my comments to be placed in the context in which I earlier commented. I recognize the need, and do in fact agree with reforms addressed to the frivolous lawsuit. But here are the facts with respect to the assertions that there is a security class action lawsuit explosion crisis that is overwhelming and inundating our court system and that we must urgently address.

The Administrative Office of the United States Courts—that is the organization that keeps the statistical records, what is happening in the court system. No one has suggested that it has any bias on behalf of plaintiffs' lawyers or investor fraud plaintiffs nor with respect to defense lawyers or securities folks. This is an outfit that collects the data. Here is what they have to say.

According to the Administrative Office of the United States Courts there were 305 securities class action lawsuits filed nationwide 2 decades ago in 1974. That would be 21 years ago. There were some 305 security class actions filed. And slightly less—let me emphasize that—slightly less than that, some 290, in 1994. So rather than the class action explosion argument, in point of fact there is approximately a 5 percent decrease.

This is at the same time in which the country has grown substantially. There are nearly 260 million people in this country. So our population has grown by millions and millions of people, and yet the number of lawsuits in this area have declined.

They go on to say,

''These numbers count multiple filings in the same case before the actions are consolidated. So the actual number of new cases is far less. Over the last several years on average suits have been filed against approximately 120 companies annually''—about 120 companies annually—''out of more than 14,000 public corporations reporting to the Securities and Exchange Commission. Out of the total of 235,000 new Federal court civil filings,''—a civil filing is as opposed to a criminal proceeding—under this total of 235,000 new civil court filings, in fact even using the preconsolidation figure of 290 cases, ''security class actions represent 0.12 of a percent of the new Federal civil cases filed in 1994.''

Those are the facts. I know that sometimes my colleagues who are so much more eloquent than I, sort of from these lofty heights make it appear that we have had a litigation avalanche. But the facts are that there are in fact fewer cases filed today in this area than there were in 1974, and that approximately 120 companies annually, out of more than 14,000, are subjected to these filings, which represents about .12 of the new Federal civil cases filed in 1994.

I do not, by making that observation, suggest that all 120 may be meritorious. There may be indeed some frivolous lawsuits that indeed the reforms that I and I think all of our colleagues can agree upon—there are some things we can do and we ought to do in that area.

Let me just share a little insight. The Rand Corp. indicates that business-to-business contract disputes, that is one business filing a lawsuit against another business, constitutes by far the largest single category of lawsuits filed in Federal court.

Although corporate executives claim that minuscule numbers by individual victims cause them to lose time, divert resources and lessen their ability to compete, I think it is fair to question why 120 suits nationwide are taking such a toll, while thousands upon thousands of suits brought by one business against another business presumably has no impact whatsoever.

As The Wall Street Journal has noted:

> Businesses may be their own worst enemies when it comes to the so-called litigation explosion.

I think the Rand Corp.'s observation is of some insight here because this legislation before us, this conference report, does absolutely nothing with respect to business suits filed against other businesses. Its scope is designed to limit private lawsuits brought as class actions to recover for investors who have lost money as a result of a securities fraud.

Here is another myth. We hear this, it is repeated, and the volume is overpowering: Securities class action suits are hurting capital formation, we are told, and that is a legitimate question. If it is hurting capital formation, we need to examine to see if it is true and, if it is true, what corrective action might be appropriate for us to consider.

But here are the facts, Mr. President. The volume of initial public stock offerings has risen exponentially over the past several years, and the number and size of public securities offerings has been at an all-time high. The number of initial public securities offerings over the past 20 years has risen by 9,000 percent.

That is the volume of the offerings, setting aside for a moment the amount of the capital that is sought to be raised through those offerings. So we have had an increase of 9,000 percent. Let me say, I think that is good for America, that is good for job creation, that is good for the economy, and I am pleased to see that.

The proceeds raised during that period of time from 1974 to 1993 increased by 58,000 percent from $98 million in 1974 to $57 billion in 1993. So in slightly less than 20 years, or approximately 20 years, the amount of capital raised through these offerings has increased from $98 million in 1974 to $57 billion in 1993, and during the same period of time, the number of securities class actions filed had actually declined by 2.3 percent.

So, Mr. President, I would say that the notion that somehow capital formation has been impeded or restricted or limited simply does not bear out, under a careful analysis, for the data that is available, and, as I say, I think this is extraordinarily good news for entrepreneurial companies and their investors, for jobs, for the economy.

I note the distinguished chairman of the Senate Banking Committee has risen to his feet. If he needs to interject, I certainly would be happy to accommodate him, because I may be a bit longer.

The PRESIDING OFFICER. The Senator from New York is recognized.

Mr. D'AMATO. Mr. President, I want to thank my colleague for his graciousness, but as I only have several minutes of remarks, I can certainly wait. I would just as soon listen to my colleague, because I want him to know that even when we differ on subject matters, I find myself always learning when he speaks, particularly when he speaks on the subject of law. I have great respect for the cogent arguments that my colleague and friend presents.

I might also say, that yesterday we heard some remarks as it relates to how members in this body, in particular, should treat each other. I daresay, that while my colleague and I probably had some very diametrically opposed positions, I hope that in the context of our discourse today, Mr. President, we understand that might even be encouraged and learn from these differences at times. I cannot ever recall an occasion where I have felt better about coming away with a slightly different opinion. If you keep your mind open, sometimes—even if you arrive at a different position—you learn something. You learn that there is something out there that maybe you have not factored in fully and later on if we have kept an open mind and are willing to learn, as this is not a static body and the law is not static, whether it is securities reform litigation or some other legislation, we can correct positions if they have to be corrected.

I must say, Senator BRYAN has been one of those Senators whose views have been very instructive to this Senator personally, and I thank him for the manner in which he has always conducted himself. It is exemplary.

I do not ever envy or look forward to the opportunity of debating with the Senator. They are always good debates, but I have to tell you, he is one of the finest debaters, and he is a gentleman, in the truest sense, in terms of the great traditions of the Senate of the United States.

I just thought during this season as we approach a very special holiday season, sometimes it would pay for us to reflect, that even though we have differences of opinion and, indeed, as is the case of the legislation that is before this body today, I look back at our differences and I think we have been able to maintain our position without losing a sense of balance.

Mr. BRYAN. Mr. President, I am most grateful for the very generous and kind remarks. Let me just say by way of response before returning to the issue of the day, the Senator from New York, the very able chairman of this committee, takes a back seat to no Member in this institution or in the other body in terms of his tenacity, in terms of his persistence and effective advocacy on behalf of the causes in which he believes.

I can recall when the Senator occupied a different chair on this floor, more to the rear of the Chamber, where he was absolutely dedicated to a proposition which affected the citizens of his State and spoke, I do not recall whether it was 10, 11 or 12 hours. This is the kind of advocate that you get.

So I have learned from experience that he is always civil in disagreement, he has always been courteous and very fair to me, and we have worked together on a lot of issues. I acknowledge and appreciate that. I would rather have him on my side, because when he is with you, things not only happen on that committee but on the floor of the Senate. I appreciate his advocacy.

Again, I pledge to him we are going to continue the discussion we have on this measure and any other on which we might find ourselves honestly and sincerely having a difference of opinion in the same spirit in which our relationship has always been, and I thank him for the very generous comments.

We were talking about the underpinning of this legislation and what has been said as an arguable predicate for its enactment, and I shared a couple of myths. I think it would be helpful if I mentioned two or three more and then comment on a couple of things before yielding the floor to the distinguished chairman.

It has been asserted in defense of the legislation that is before us that security suits are filed without reason. Every time a stock price goes down 10 percent or more, there is a lawsuit. We have heard the strike lawyers are out there kind of prowling, and any time there is a dip in the stock price, bam, they are out there and they have these suits. That may occur on occasion.

I am not here to say there is no abuse. I reemphasize somewhat ad nauseam that when there is abuse, we need to change the law to make sure that kind of conduct is punished in a way which is most understood and that is a financial sanction.

But here is the data, here are the facts, not the anecdotal information, not the story that someone heard about someone who had been sued in a securities suit. Here are the facts.

The empirical data established that over 95 percent of the companies whose stock falls more than 15 percent in one day are not sued. These recent detailed studies document the falsity of the argument of the proponents of the legislation. A comparison of the number of stock price drops 10 percent or more in one day between 1986 and 1992, and a number of suits filed against those companies whose stock price dropped revealed that only 2.8 percent of those companies were sued.

A second study by the University of California at Berkeley, completed in August of last year, 1994, tested a sample of 589 cases of large stock price declines following a quarters earnings announcement. Extensive research revealed that only 20 lawsuits, amounting to about 3.4 percent of the sample, were filed. This finding is hardly consistent with the widespread belief that shareholder litigations are automatically triggered by large stock price declines.

The study was consistent with yet a third study conducted by academics at the University of Chicago in March of 1993. That study revealed that out of 51 companies that had sustained 20 percent or greater declines in earnings and sales, only one company of those 51 was the target of a shareholders' suit. Again, one of these myths that have assumed lifelike reality that is being asserted is that the suits are filed every time a stock price goes down. That simply is not borne out by the evidence.

Let me address just a couple more of these myths. Another one is that securities class action suits do not help investors, and private litigation is, in fact, the only way for individual citizens to collect damages from those who commit fraud. For most small investors, who do not have the resources to file their own lawsuit, class action representation is the only hope they have of collecting damages from wrongdoers. The Securities and Exchange Commission may prosecute some securities frauds, but it does not have, as I indicated earlier, the resources to help all victims of fraud recover their losses. That is the province and responsibility of private legal actions, which the Securities and Exchange Commission has repeatedly termed a ''necessary supplement'' to its activities.

Finally, let me just say the other myth that we hear a good bit is that plaintiff lawyers get all the money in these suits, and victims are left with pennies. The average attorney's fee and expense award is 15.2 percent of recovery, according to the authoritative Journal of Class Action Reports. The Journal based its findings on a most comprehensive independent study of attorney's fees in class action lawsuits involving 334 securities class actions, in which $4.2 billion was recovered for victims of fraud. The same journal reported in 1993 that, on average, for every dollar recovered in securities class actions, approximately 83 cents has been distributed to shareholders, and only 17 cents has gone to attorneys, including their expenses.

Let me just say that I have heard the argument here from a number of my distinguished and very able colleagues that we have to do something, that innocent investors get only a small pittance of the amount recovered in these class actions. Let us assume, for the sake of argument, that were true—assuming but not conceding. Mr. President, not one single thing in this legislation would alter that—nothing. There is nothing in this legislation that would provide any type of change in our present system that would increase the amount of money that would be allocated in a recovery between plaintiffs' attorneys' fees and the amount of money that the individual plaintiff recovers.

Now, it is argued that this legislation is being introduced on behalf of the small investor, that we are really doing this, the proponents assert, because the small investor needs protection out there; that we have all of these ravenous lawyers here taking advantage of the system and taking advantage of the small investors, and that we really strike a blow for truth, justice, and the American way, and small investors if we support this legislation.

Regardless of how little or how much you may know about this area of law—and I am frank to disclaim any expertise other than what I have gleaned from my review of this legislation as it has been processed—I think it is fair to say, who would best represent small investors in protecting their interests? Let us set aside the lawyers for a moment because, hey, look, clearly they make money as a result of these lawsuits. There is no question about that. Let us set aside the accountants, let us set aside the brokerage folks, let us set aside the companies that are issuing stock. I think it can be conceded that each of those groups across the philosophical divide have a vested interest. No question about it. So let us look to other groups that are not lawyer-based or involved in securities industry work, or its allied fields, and let us see what those folks say about this legislation as it has been processed.

I think it is fair to conclude that this legislation is proposed by every major consumer group—every one of them, including the Consumer Federation of America; all major senior citizens groups, including the AARP; all major State and local organizations responsible for investing taxpayer pension funds; the Conference of Mayors; the League of Cities; the Association of Counties; Government and Finance Officers; Law Enforcement Officials; the North American Securities Administrators Association; a good many State attorneys general; the Fraternal Order of Police; educational institutions, and others, all have opposed it.

Now, any one of those groups may not be your cup of tea. You may have some reason, philosophically to disagree with positions they have taken on other matters of public policy, or other legislation before this Congress. But I think it taxes credibility beyond the point of being sustained to conclude that each and every one of these groups oppose this legislation, even in the conference form, unless they were asserting that in their own judgment, representing the organizational interests that they do, that they honestly and sincerely believe that this is not in the best interest of the small investor. These are the folks, unless we assert that there is some monstrous conspiracy organized by these ravenous plaintiff lawyers that has corrupted these organizations, ranging from the Consumer Federation to the Conference of Mayors, to the League of Cities, to the Association of Counties, to the Fraternal Order of Police—let me say, even those that are enamored with the Oliver Stone approach to life and film, I suspect, have some difficulty believing that—unless one subscribes to the conspiracy theories in history—there is a conspiracy of this magnitude involved. I respectfully submit, Mr. President, that these organizations express their opposition because they believe it is not in the best interests of consumers.

The North American Securities Administrators Association is not a partisan group. There are 50 States—parenthetically, a majority of those States, I think, or a fair majority, are now States that have Republican Governors. So I offer this context so that it not be asserted that there is any partisan bias that may be reflected by this statement.

Here is a letter sent by way of fax yesterday, December 20. I think it is worth sharing because, you will recall, I mentioned that in terms of the enforcement mechanisms that are provided to police for monitoring the securities markets in America—public protection, investor protection, if you will, are predicated upon three pillars: The Securities and Exchange Commission at the Federal level, the private class action investor lawsuit which we have talked about in our discussion this afternoon, and finally, at the State level, the North American Securities Administrators Association, which I would daresay, without having reviewed the legislative structure of each of the States, is subject to appointment through the executive branch of Government, either the Governor's office or the Attorney's General Office.

Here is what that group has to say, representing the States. I think a State perspective, and rightly so, have taken on an enhanced appreciation in this Congress. I commend my colleagues on the other side of the aisle for focusing much attention in terms of what is occurring at the State level. I think we can gain considerable insight.

Here is what their correspondence of yesterday said with respect to this legislation:

DEAR SENATOR: I am writing today on behalf of the North American Securities Administrator's Association to urge you to sustain President Clinton's veto of H.R. 1058, the Securities Litigation Reform Act. In the U.S., NASAA is the national organization of the 50 State securities agencies.

While everyone agrees on the need for constructive improvement in the Federal securities litigation process, the reality is that the major provisions of H.R. 1058 go well beyond curbing frivolous lawsuits and will work to shield some of the most egregious wrongdoers from legitimate lawsuits brought by defrauded investors. NASAA supports reform measures that achieve a balance between protecting the rights of defrauded investors and providing relief to honest companies and professionals who may unfairly find themselves the target of frivolous lawsuits.

Unfortunately, H.R. 1058 does not achieve this balance. NASAA is concerned with H.R. 1058 go beyond the concerns articulated by President Clinton in his veto message. In sum, NASAA has the following concerns with 1058.

Mr. President, I will give these abbreviated treatment. The bill fails to incorporate a meaningful statute of limitations. I will say more about that later during the course of our discussion this afternoon and this evening. I assure my patient colleague that I will wind these comments up so he may have a chance to express his views.

The bill's safe harbor lowers the standard for assuring truthfulness of predictive statements about future performance. My colleagues will recall it was not until 1974 that future or predictive statements were even permitted, because of the inherent risk and the temptation of those who were involved in selling and marketing, to overstate propositions to the decided disadvantage of prospective purchasers of securities.

No. 3, the bill fails to include aiding and abetting liability for those who participate in fraudulent activity, and a provision of the bill's proportionate liability section is unworkable and disfavors older Americans.

Mr. President, I am very interested, and I am sure that those who support the bill will be addressing themselves on this, but I do not know, how do we impeach the integrity of their comment? These are 50 securities administrators who tell us that in their judgment small investors are losing a great deal in terms of protection by this legislation, while acknowledging, as do I, that we need some balance. That, clearly, frivolous lawsuits ought not to be tolerated. Some of that is occurring. We ought to come down with a heavy hammer, in my view, to preclude that activity. I think it is instructive to listen to what that group had to say.

Let me be parochial for a moment and then I will leave the floor to my good friend. The State of Nevada, for whatever it is worth, a plurality of registered voters in my State are Republican. I offer that in the context of what I am about to say in terms of the kinds of letters that we are getting and the position taken.

Churchill County, a small rural county in our State, expresses their opposition to this legislation; the city of Boulder City; the city of Carlin, through the mayor; the city of Las Vegas, expressing its opposition to the Treasurer; the city of Lovelock, another small community; the city of Mesquite, our newest incorporated city, through the mayor; the city of Reno; The city of West Wendover; Clark County, the largest county in our State, the county treasurer expresses his strong opposition; the Clark County school district; the Douglas County Board of Commissioners; the Elko County Board of Commissioners; the Eureka County Board of County Commissioners; the Nevada League of

Cities; Nevada Public Agency Insurance Board; the Pershing County Board of Commissioners; the Reno Sparks Convention Visitors Authority; the Nevada Attorney General; the State of Nevada Employees Association in Washoe County school district, White Plain County, to name just a few.

I find it incomprehensible to believe that all of these folks are simply tools of class action plaintiff lawyers. I just do not think that a fair analysis—just using our own intuitive judgments, why would all of those folks in our State, as many other States, have expressed those concerns? They have expressed those concerns, Mr. President, because cities and school boards rely upon the securities market. They have investor portfolios. They are potential victims of fraud.

The Orange County situation is one that each of us is familiar with. They want to be sure on behalf of the local county or city or school district, whatever the entity might be, that if indeed they are victimized by fraud, they can be covered on behalf of the constituents whose money ultimately is what is at risk. That is why I have asserted every American has an interest in the outcome of this legislation.

I yield the floor and I thank the chairman for his great courtesy in allowing me to proceed at some length when I know he has been waiting a while.

Mr. D'AMATO. Mr. President, I ask unanimous consent for the purposes of bringing the Senate up to date, that I may be permitted to proceed for no longer than 5 minutes in morning business.

The PRESIDING OFFICER (Mr. SMITH). Without objection, it is so ordered.

SUBPOENA ENFORCEMENT

Mr. D'AMATO. Mr. President, yesterday, after a full day of debate, the Senate voted to authorize Senate legal counsel to go to court to enforce the subpoena of the Whitewater Special Committee for the notes of William Kennedy. Mr. Kennedy took these notes at a Whitewater defense meeting at the offices of Williams and Connolly. This meeting was attended by private counsel for the Clintons and four Government employees.

I have today asked the Senate legal counsel to begin the process of enforcing the subpoena as quickly as possible. The Senate will ask the court to rule on a Senate enforcement action on an expedited basis so that we can get a determination in the courts as quickly as possible.

Now, the Senate legal counsel will file papers with the court on Wednesday, December 27. There are a number of things he must do prior to that. I have been informed he has attempted to contact counsel for Mr. Kennedy, personal counsel for the President and Mrs. Clinton, and the White House counsel to discuss a schedule in order to obtain a court ruling as fast as possible. That is so that we can have an expedited proceeding. I hope they will try to arrange for that.

As I have said repeatedly, and I want to reiterate, the Senate will stop any action to enforce the subpoena as soon as we have Mr. Kennedy's notes. Until that time, though, we will continue and take all action necessary to enforce the subpoena. So there will be no mistake, while I hope we can get these notes without having to go to court, we are not going to wait or delay and then have a situation where negotiations may break down. I understand they are negotiating—that is, "they" being White House counsel and the President's counsel—right now with Members of the House.

As I said before, I believe that the Senate and the American people have a right to all of the facts about Whitewater. If these notes help us obtain those, certainly, they should be provided. Again, we are going forward, but I say if we get the notes we will stop the proceedings. At this time, though, we are attempting to get an expedited proceeding. It is our intent to be in court on December 27.

Mr. President, I thank my colleague for permitting the opportunity for bringing that update.

Mr. SARBANES. Mr. President, will the Senator yield for a moment?

Mr. D'AMATO. Certainly.

Mr. SARBANES. Is the Senator now going to address the securities bill?

Mr. D'AMATO. Yes. I asked I might be permitted to proceed in morning business for no more than 5 minutes, just for the purposes of that update. That was the only thing I asked. But I was now going to address the securities reform litigation.

Mr. SARBANES. I would like to address the issue the Senator addressed. I can defer until he finishes the securities matter?

Mr. D'AMATO. No, I yield to my friend, certainly. I think it would be appropriate, if he wants to do that, to yield to him now for purposes of making his remarks at this time.

The PRESIDING OFFICER. The Senator from Maryland.

Mr. SARBANES. Mr. President, I appreciate the Senator from New York yielding.

I think the report that was just brought to the floor underscores what I thought was the wisdom and the reasonableness of the amendment that was offered yesterday and the suggestion that we ought to try to resolve this matter without moving to a confrontation. I listened carefully to my colleague. As I think he said, he intends to be in court on the 26th——

Mr. D'AMATO. The 27th.

Mr. SARBANES. That is, I think, where the majority has intended to be all along. We have consistently suggested if we would draw back here and try to resolve this matter, it could be worked out without a court test.

The assertion is made that by going to court, they will speed the process up. In fact, they will slow it down. That is very clear. Even under expedited procedures, it is going to take a fair amount of time to carry this matter through. So, if you want to get a quick resolution of it, obviously the way to do it would have been to follow the path that we outlined yesterday with respect to the furnishing of the notes and to try to have worked in obtaining from the House an agreement or understanding with the White House that would make it possible for them to do so.

They have offered to do it. They have obviously come forward in an effort to try to do it.

This push to the courtroom, I think, is simply to create, as it were, a public issue and a confrontation. As I indicated yesterday, I regret that. I continue to regret it. I think it is unnecessary. I think it is a provoked controversy, largely for political content. I think as these other negotiations seem to bear fruit, it only underscores that point.

I do think if the matter is carried to court and resolved there, that we may end up with it being clear that a very serious mistake was made by the Senate.

I thank the Senator for yielding.

The PRESIDING OFFICER. The Senator from New York.

Mr. D'AMATO. Mr. President, I am not going to speak for more than 30 seconds on this whole issue of the subpoena. I just wanted to serve notice and let the administration know that, again, if they successfully complete their negotiations with whoever they are negotiating with—the House and whatever Members—that is fine, as long as we get the notes. If we do not, if it gets protracted, we will continue. I have to do that so that the process does not break down. So I thought I would at least bring us up to date on that.

SECURITIES LITIGATION REFORM ACT—VETO

The Senate continued with the reconsideration of the bill.

Mr. D'AMATO. Mr. President, I urge my colleagues to remain firm in their support of this legislation, legislation that, just two weeks ago, was passed overwhelmingly in the Senate, legislation that was passed overwhelmingly in the House, legislation that was clearly, once again, approved by the House, when the President's veto was overturned by a huge majority, the vote was 319 to 100.

It is here now for us to consider. Let me say, Mr. President, no one can argue that the current system is not broken because it is broken. Some of my colleagues raise some objections related to pleadings, the pleading requirements and some things of a very technical nature—whether or not, for example, the second circuit opinion should be incorporated into this law—we are really getting into hair splitting.